No. 12672

United States
Court of Appeals
for the Ninth Circuit.

EUGENE M. BRUNNER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeals from the United States District Court,
Southern District of California,
Central Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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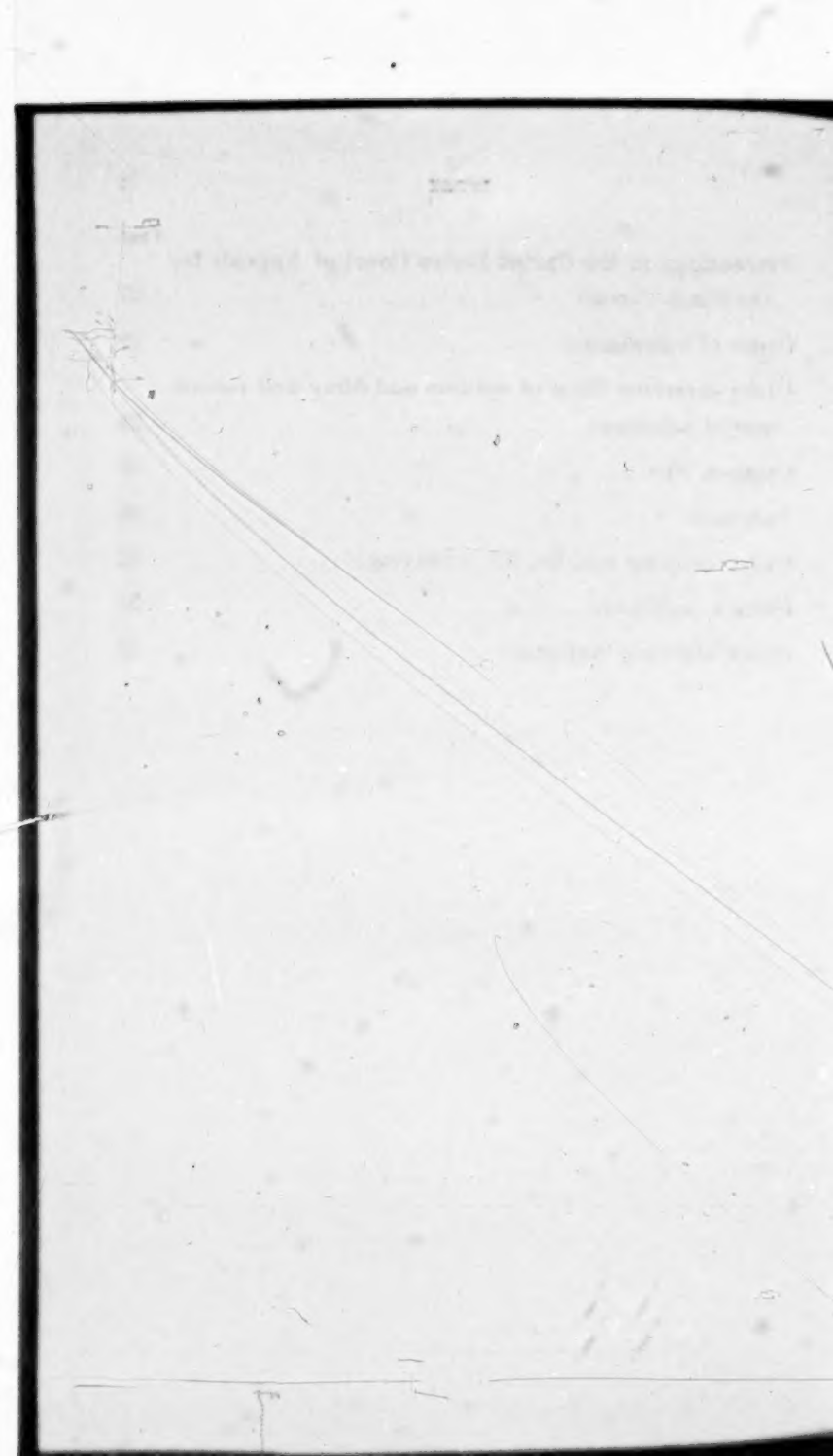

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WILLIAM B. ESTERMAN,
6513 Hollywood Blvd.,
Hollywood 28, Calif.

For Appellee:

ERNEST A. TOLIN,
United States Attorney,

VINCENT N. ERICKSON,
Assistant U. S. Attorney,

600 U. S. Post Office & Court House Bldg.
Los Angeles 12, Calif.

District Court of the United States for the Southern District of California Central Division
No. 21408 Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SIDNEY WEINBAUM,
Defendant.

SUBPOENA TO TESTIFY

To Dr. Eugene Brunner, Shell Development Company, Emeryville, California.

You are hereby commanded to appear in the District Court of the United States for the Southern District of California at Judge Harrison's Courtroom in the city of Los Angeles on the 30th day of August, 1950, at 10:00 o'clock A.M. to testify in the case of the United States v. Sidney Weinbaum.

This subpoena is issued on application of the[1] United States.

Please report to: Ernest A. Tolin, United States Attorney, Lobby, 6th Floor, Federal Bldg., 312 North Spring St., Los Angeles, Calif.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ MAXINE LEWIS,
Deputy Clerk.

Date Issued: August 11, 1950.

---

[1]Insert "United States," or "defendant" as the case may be.

Return on Service

Received this subpoena at San Francisco on 8-14-50 and on 8-14-50 at 4560 Horton St., Emeryville I served it on the within named Witness by delivering a copy to him.

EDWARD J. CARRIGON,
U. S. Marshal.
By T. McSOWAN,
Deputy.

Received: August 14, 1950.

[Endorsed]: Filed August 16, 1950.

In the United States District Court in and for the Southern District of California Central Division
No. 21408 Crim.

In re Eugene Brunner

Contempt

CERTIFICATE, JUDGMENT AND COMMITMENT FOR CONTEMPT

Eugene Brunner, above named, on August 31, 1950, having been called as a witness on behalf of the plaintiff in the case of United States of America, plaintiff, v. Sidney Weinbaum, defendant, No. 21408 Criminal, then on trial in this Court before Honorable Ben Harrison, Judge Presiding, Ernest A. Tolin, United States Attorney, and Vincent N. Erickson, Assistant United States Attorney, being present as attorneys for the plaintiff, United States

of America, said Eugene Brunner, after being duly sworn in open Court, was asked by one of the attorneys for plaintiff, United States of America, certain questions upon material issues in the aforesaid case then on trial, and gave answers thereto as follows:

"Q. 'Between the years 1937 and 1939 were you a member of the Communist Party in Pasadena, California?'

"A. 'I feel I must decline to answer that on the ground that it might incriminate me.'

"The Court: 'The Court directs you to answer the question.'

(Motion and argument by counsel.)

The Court: 'I directed you to answer the question. Do you still refuse to answer the question?'

The Witness: 'I as somewhat confused as to my rights. Perhaps if you will permit me to consult my counsel.'

The Court: 'You have consulted with your counsel, have you not?' The Witness: 'Yes.'

The Court: 'Have you any further questions to ask of this witness?'

"Q. 'Did you during that same period of time ever see the defendant at a meeting of the Communist Party?'

(Motion and argument by counsel.)

"The Court: 'The witness has not answered the last question and hasn't said whether he would answer it or not.'

The Witness: 'What was the question?'

(Question read as follows: Did you during that same period of time ever see the defendant at a meeting of the Communist Party?)

The Witness: 'I must decline to answer that on the ground that it might incriminate me.'

The Court: 'I am going to direct to you to answer the question. Are you going to refuse to answer the question the same as you did the other question?'

The Witness: 'I feel my answer must stand.'

The Court: 'Then you refuse to answer the question even though the Court has directed you to do so.'

The Witness: 'I decline to answer on the ground it might incriminate me'."

William B. Esterman entered his appearance as attorney for witness, the said Eugene Brunner. The jury was thereupon excluded from the Court-room.

II.

The Court, after hearing the argument of counsel for said Eugene Brunner in the presence of said Eugene Brunner and in the presence of his counsel, William B. Esterman, found that the refusal of the witness to answer the questions aforesaid was deliberate, wilfull and premeditated, and the Court thereupon found and adjudged that the said Eugene Brunner was in contempt of Court and that said Eugene Brunner did wilfully disobey the lawful order of this Court, to wit: the order of the Court to answer the questions aforesaid.

The Court thereupon, in the presence of said Eugene Brunner and in the presence of his counsel, William B. Esterman, then ordered as follows:

> "And I so find you guilty of contempt and it is the judgment of this Court that you be confined in the county jail for a period of six months unless prior to the expiration of this trial you purge yourself of such contempt by voluntarily offering to answer such questions as may be propounded to you. You are remanded to the custody of the United States Marshal."

Now, therefore, upon the foregoing facts, which I hereby certify were seen and heard in the actual presence of the court,

It Is Ordered, Adjudged and Decreed that the said Eugene Brunner is guilty of contempt of this Court.

It Is Further Ordered, Adjudged and Decreed that the said Eugene Brunner is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months in the Los Angeles County Jail, Los Angeles, California, unless prior to the expiration of the trial of the case of United States of America v. Sidney Weinbaum, No. 21408 Criminal, the said Eugene Brunner should purge himself of this contempt by voluntarily offering to answer the aforesaid questions.

It Is Further Ordered, Adjudged and Decreed that the said Eugene Brunner be committed forthwith.

It Is Further Ordered, Adjudged and Decreed that the Clerk of this Court deliver a certified copy of this Certificate, Judgment and Commitment for Contempt to the United States Marshal, or other qualified officer, and that said certified copy serve as the commitment of said Eugene Brunner.

Dated: September 1, 1950.

/s/ BEN HARRISON,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed September 1, 1950.

EAT:VNE:11

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Eugene M. Brunner, residing at 7631 Leviston Street, El Cerrito, California, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment and sentence of the United States District Court for the Southern District of California, Central Division, adjudging him in contempt (criminal) of said Court, rendered and entered on August 31, 1950, and committing him to the custody of the United States Marshal; to be confined in the County Jail for a period of six months; said Eugene M. Brunner is presently confined, pursuant to said

judgment and sentence in the County Jail of the County of Los Angeles, State of California.

Dated: September 1, 1950.

/s/ WILLIAM B. ESTERMAN,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 1, 1950.

In the United States District Court, Southern District of California, Central Division

Honorable Ben Harrison, Judge Presiding

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIDNEY WEINBAUM,

Defendant.

Appearances:

For the Plaintiff:

ERNEST A. TOLIN, Esquire,
United States Attorney,

VINCENT M. ERICKSON, Esquire,
Asst. United States Attorney.

For the Defendants:

BEN MARGOLIS, Esquire.

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

EUGENE BRUNNER

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Eugene Brunner.

Direct Examination

By Mr. Erickson:

* * *

Q. Between the years 1937 and 1938 were you a member of the Communist Party in Pasadena, California?

A. I feel I must decline to answer that on the ground that it might incriminate me.

The Court: The court directs you to answer the question.

* * *

I have directed you to answer the question. Do you still refuse?

The Witness: (No answer)

The Court: I directed you to answer the question. Do you still refuse?

The Witness: Your Honor, I am not——

The Court: I am asking you to answer the question.

The Witness: I am somewhat confused as to my rights. Perhaps if you will permit me to consult my counsel——

(Testimony of Eugene Brunner.)

The Court: You have consulted with your counsel, have you not? The Witness: Yes.

The Court: Any further questions to ask of this witness? Mr. Erickson: Yes, your Honor.

The Court: Proceed.

Q. (By Mr. Erickson): Calling your attention to the years 1937 through 1939 were you acquainted with the defendant Sidney Weinbaum in Pasadena, California?

A. Yes; I knew Sidney Weinbaum.

Q. Did you during that same period of time ever see the defendant at meetings of the Communist Party?

* * *

Q. (By Mr. Erickson): Dr. Brunner, were you ever——

The Court: Just a moment, the witness did not answer the last question, nor say whether he would answer it or not.

The Witness: What was the question.

The Court: Read the question.

(Question read as follows:

"Q. Did you during that same period of time ever see the defendant at meetings of the Communist Party?")

The Witness: I must decline to answer that on the ground that it might incriminate me.

* * *

The Court: Mr. Witness, I am going to direct you to answer that question. Are you going to refuse

(Testimony of Eugene Brunner.)

to answer the question the same as you did the other?

The Witness: I feel my answer must stand.

The Court: Then you refuse to answer it even though the court has directed you to do so?

Mr. Margolis: I renew my motion for a mistrial on the ground this is prejudicial error.

The Court: Same ruling.

The Witness: I decline to answer on the ground it might incriminate me.

* * *

Mr. Esterman: Now I am not going to read extensively from the cases which your Honor indicated a familiarity with this morning, but I think the record should show specifically and very clearly language which may have escaped your Honor's attention or which may have perhaps been forgotten in the light of the passage of time. Particularly do I have reference to the Rosen case.

The Court: I read the Rosen case again this noon, counsel.

Mr. Esterman: Your Honor has read it?

The Court: I read it again this noon.

Mr. Esterman: Then I shall not take the time of the court to read it.

* * *

Mr. Esterman: I have mentioned the Rosen case and there have been other cases mentioned this morning, I don't think by name but it is the one that contains among other things this language—I will just read a few sentences.

* * *

The court says: "After discussing the remarks of the court below we cannot agree that the matter is so simple. The answers to these questions in these cases may not have even tended toward the incrimination of appellant but they may have been links in the chain of circumstantial evidence strong enough to convict him of a number of crimes; or such answers might well provide the means whereby such evidence could be discovered."

And also I would like to commend to your Honor's attention a case which has not been discussed here at all, but one which has language which I think expresses our views pretty concisely. It is the case of McFadden versus Reynolds. It appears in a note at 70 Corpus Juris 731, and is found in 11 Atlantic 638. This is a Pennsylvania case, 638 at page 641. This is what the court said:

> "We are not prepared to hold that, where a witness is asked upon the stand to say whether he has committed a crime, he shall be compelled to do so simply because he may, if a prosecution for that crime is subsequently instituted against him, plead the statute of limitations in defense."

I am stating this because there was some discussion with reference to remoteness and I am addressing myself to that now.

> "It seems to us he is protected against criminating himself in such a manner as to subject himself even to a prosecution were he

compelled to answer the question as a witness, his answer would be sufficient, when testified to by others who heard it, to lay before a magistrate who could commit him to prison to answer the charge, in default of bail. It would also be sufficient to place before a grand jury, who could find an indictment against him upon mere proof of his extorted answer. He could thereupon be compelled to appear in a criminal court to answer the charge, and would be obliged to employ counsel to defend him. He would necessarily undergo all the expense and trouble, besides suffering the shame, perhaps the ignominy, of defending himself against a criminal accusation made by his own mouth against himself, because he was coerced to do so by the peremptory order of a court clothed with power to commit him indefinitely to prison for contempt in case of disobedience. At least, he would be obliged to plead the statute of limitations, and, if the crime were infamous, an acquittal on such a plea would be scarcely better than a conviction. We have never held that a witness might be compelled to criminate himself in such circumstances and with our present views we decline to hold so now."

Your Honor, there has been some reference made and at this point I want to show we rely also on the unequivocal holdings in the Kasinowitz and Alexander cases, without discussing those cases, since I take it, your Honor is much more familiar with

them now than perhaps even I could be after extensive reading.

There are a couple of points I want to bring out in connection with the reason for the kind of answers which my client gave. We are under no obligation to explain to the court or anyone why we answer as we do since the Rosen case and Potter [phonetic] case make it very clear that while there may not be an apparent reason if there is one which would be deduced from the circumstances, if there is a possibility as the courts have pointed out in all these cases of forging a link in a chain of circumstances or circumstantial evidence that is enough. There is no power in the court or anyone to say to the witness or tell him specifically:

"Why did you decline to answer this particular question?"

since if there were that power obviously the privilege——

The Court: I haven't asked that question. I am familiar with the rule in that respect. I didn't ask the witness that question.

Mr. Esterman: I think we will agree on that.

Now, there have been some observations made during the past few days about the Smith Act and I think it was pointed out here, although my recollection doesn't serve me too well, but probably will be before the day is out, that the Smith Act was passed in 1940 and became law and that the events concerning which counsel is inquiring relates to the years 1938 and 1939—1937, '38 and '39.

I do not agree with the court's position that this forecloses any possibility so far as my client is con-

cerned, of incriminating himself by any answer. I think that the court in fact—I am sure the court will take judicial notice of the present status of that case in the second circuit. I don't have any citations but am speaking of the case where the 11 Communists were convicted and which came down again from the second circuit. I do not have the citation but I do ask the court to take judicial notice of that and this fact and my recollection serves me well indeed that even though this indictment was brought under the Smith Act and I think under the Conspiracy Statute, there was no hesitancy on the part of the Government in this case to go back, so to speak, to the year one. Not only that—this went on throughout the entire proceeding over the objections of counsel and the record I know will show this and there was no point made successfully at any rate, that the Government had no right to go back of 1940.

I ask the court to take careful note of this because it is at least in my mind and in my client's mind makes a great difference as to whether he incriminates himself or not in answering either one of the two questions that have been asked.

Now, this one more thing I want to mention in this connection, which may seem sort of old hat to the Government because they were through this in the Alexander case, although it wasn't in this court, I am asking the court at this time to take judicial notice of the proceedings of the proceedings before the sub-committee of the Appropriations Committee of the House of Representatives with reference to

the Department of Justice appropriation for the year 1951, 81st Congress, Second Session, page 86, where your Honor will recall there was testimony from Raymond Whearty, who at that time was acting Assistant Attorney General, Criminal Division, where he testified before a sub-committee of this committee concerning 1951 appropriation for the Department of Justice.

He testified that the criminal division now has ready for prosecution some 12,000 cases against, and this is a quote:

> "Members of the Communist Party who can be shown to be sympathetic and appreciative of its views."

And this excerpt:

> "The bulk of the cases involve subversive activities as applied to individuals or organizations. By that I mean persons who are active members of the Communist Party and similar organizations, or who appear to be acting in concert with Russian interests. Does that answer your question sufficiently?"

And another:—this is still Mr. Whearty talking:

> "I should also say with respect to many of these persons engaged in subversive activities such as the Communist case in New York, in line with our appearance before the committee last year, there is a program of extensive suits to prosecute members of the Communist Party who can be shown to be sympathetic and appre-

ciative of its views. We prosecute them as individuals under the Smith Act."

And let me digress a moment to say that there have been such prosecutions and let me also point out that in this respect, this question:

"Have you ever been a member or were you a member at some prior time,"

it has been my experience, at least insofar as I have been able to assimilate what I have read of these cases, your Honor, that the problem—the job, the burden, the task of showing a dis-affiliation, let us say, of a person who at one time was a member presumably shouldn't be a task or burden at all. There is a presumption that he no longer is that. Every citizen is not a criminal until proven but in practice I regret to say there seems to be the assumption that once affiliated always affiliated and the burden is, if I read these cases correctly and some of the publicity attached to them, the burden is on the former affiliate, the person who belonged before, to prove conclusively that he no longer is something that he shouldn't be.

Continuing with Mr. Whearty's testimony:

"I call your attention to the fact that in New York the defendants in the Communist trials have been directed to file their briefs."

Of course this is ancient history. We know what happened before the Circuit Court of Appeals.

"I feel that if the case is decided in the lower court it will be in the Supreme Court of the United States next fall."

Meaning the fall of 1950.

"I cannot conceive of the Supreme Court not taking this case and we will have an ultimate decision one way or the other. If the Government is sustained in the Supreme Court of the United States it will be about the fiscal year 1951 when that program will come up."

Speaking of the program that I alluded to a few minutes ago.

"That is the work load which we must look forward to as possible and indeed very probable.

"Mr. Rooney ——"

evidently one of the Committee members——

"of the 21,105 cases now pending how many of them would you say depend on the outcome of the Communist trial in New York, Mr. Whearty?

"Mr. Whearty: 12,000."

Now, it is my position, your Honor, that there is in connection with the questions before us—I think a careful consideration of the matters from our point of view, establishes that this kind of program is projected by the Government. We have the word of Mr. Whearty of the Department of Justice, with which my colleague here is directly and immediately associated, and we have the right to assume that my client stands in that same category.

* * *

Now, here are questions that come along dealing

with possible membership in the years 1937, '38, and '39 and it seems to me that there is no present danger in the witness testifying concerning those years. Other witnesses have testified.

I notice as a matter of fact that it is a matter of common knowledge that Mr. Pressman, a former government employee, has publicly announced his membership. It is not something that is considered he should deny. In my opinion, the chances of incriminating themselves are so remote that any private interest here must give way to the public interest in inquiring into and ascertaining the truth.

* * *

Now, as I say, I find the witness, Eugene Brunner, guilty of contempt. He will kindly stand and come forward.

You have heard the court's statement as to finding you guilty of contempt of this court in refusing to answer the two questions that were propounded to you this morning, and which you refused to answer upon the order of the court, did you not?

Witness Brunner: Yes, your Honor.

The Court: And I so find you guilty of contempt and it is the judgment of this court that you be confined in the County Jail for a period of six months, unless prior to the expiration of this trial you purge yourself of such contempt by voluntarily offering to answer such questions as were propounded to you. You are remanded to the custody of the United States Marshal.

* * *

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 32, inclusive, contain the original Subpoena; Certificate, Judgment and Commitment for Contempt; Notice of Appeal; and Designations of Record on Appeal and full, true and correct copies of Indictment and Minute Orders Entered August 2, 29, 30 and 31, 1950 which, together with reporter's transcript of proceedings on August 31, 1950, transmitted herewith, constitute the record on the appeal of the witness Eugene Brunner from the Certificate, Judgment and Commitment for Contempt to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $7.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 6th day of October, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12672. United States Court of Appeals for the Ninth Circuit. Eugene Brunner, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: October 9, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

At a Stated Term, to wit: The October Term 1949 of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the fifth day of September, in the year of our Lord one thousand nine hundred and fifty.

Present: Honorable Clifton Mathews, Circuit Judge, Presiding,

Honorable Homer T. Bone, Circuit Judge,

Honorable Walter L. Pope, Circuit Judge.

[Title of Cause.]

ORDER GRANTING MOTION OF APPELLANT FOR ADMISSION TO BAIL PENDING APPEAL

Upon consideration of the motion of appellant

for admission to bail pending appeal, and of oral presentation thereof by William D. Esterman, counsel for appellant, and Mr. Tobias G. Klinger, Assistand United States Attorney, in opposition thereto,

It Is Ordered that said motion be, and hereby is granted, and that appellant be, and he hereby is admitted to bail pending appeal in the amount of five thousand dollars ($5,000.00), the bond to be approved by the United States Attorney for the Southern District of California, and the trial judge, and filed with the clerk of the District Court.

In the United States Court of Appeals for the Ninth Circuit

No. 12672—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EUGENE M. BRUNNER,

Defendant.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

I.

The court below erred in ordering appellant to answer the questions put to him, and in adjudging and committing appellant, and in sentencing appellant for contempt for his refusal to answer said

questions, in that under the Fifth Amendment to the Constitution of the United States, appellant had the right to refuse to answer said questions and each of them on the ground that answers to said questions and each of them might tend to incriminate him.

II.

The sentence of the court below is void and should be modified and/or set aside on the ground that said sentence is based upon a civil contempt and the punishment of appellant thereunder could not be continued beyond the duration of the trial in which the contempt was allegedly committed.

Dated October 18, 1950.

Respectfully submitted,
/s/ WILLIAM B. ESTERMAN,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 19, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 19 (6), appellant hereinbelow designates the following portions of the record herein on appeal:

1. The following portions of the Reporter's Transcript of the proceedings herein covering that

portion of the record relating to Eugene M. Brunner, dated August 31, 1950, said transcript consisting of a total of 44 pages:

Page 3—Lines 16, 17, 18, 19, 20.

Page 4—Lines 19 through 25, inclusive.

Page 5—Lines 1 through 15, inclusive.

Page 7—Lines 6 through 16, inclusive.

Page 8—Lines 7, 8, 9, and lines 12 through 19.

Page 26—Lines 6 through 18.

Page 27—Line 25.

Page 28—Lines 1 through 3; lines 9 through 25.

Page 29—Entire page.

Page 30—Entire page.

Page 31—Entire page.

Page 32—Entire page.

Page 33—Entire page.

Page 34—Entire page.

Page 35—Entire page.

Page 41—Lines 1 through 11.

Page 43—Lines 5 through 19.

2. Subpoena requiring attendance as a witness in the above-entitled matter of Eugene M. Brunner on August 29, 1950, together with return thereon.

3. Certificate of Judgment and commitment for contempt of Eugene M. Brunner, dated September 1, 1950.

4. Notice of Appeal filed herein by Eugene M. Brunner.

5. This Designation.

Dated: October 18, 1950.

/s/ WILLIAN B. ESTERMAN,
Attorney for Eugene M.
Brunner, Appellant.

[Endorsed]: Filed October 19, 1950.

No. 12672

United States Court of Appeals

For the Ninth Circuit

EUGENE M. BRUNNER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court, Southern District of California, Central Division.

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, April 9, 1951.

Before: Mathews and Stephens, Circuit Judges;
Fee, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Wm. B. Esterman, counsel for appellant, and by Mr. Ernest A. Tolin, United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, May 18, 1951.

Before: Mathews and Stephens, Circuit Judges;
Fee, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

United States Court of Appeals
for the Ninth Circuit

No. 12,672

EUGENE M. BRUNNER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court,
Southern District of California,
Central Division

May 18, 1951

Before: Mathews and Stephens, Circuit Judges;
Fee, District Judge.

James Alger Fee, District Judge.

OPINION

On August 31, 1950, the United States District Court in and for the Southern District of California, Honorable Ben Harrison, United States District Judge presiding, was engaged in the trial of a criminal prosecution wherein the United States of America was plaintiff and one Sidney Weinbaum was defendant. The indictment charged perjury by defendant. Brunner was called as a witness in behalf of the United States.

Brunner was asked:

Q. "Between the years 1937 and 1938, were you

a member of the Communist Party in Pasadena, California?" He said: A. "I feel I must decline to answer that on the ground that it might incriminate me."

After considerable colloquy, in which Brunner was directed to answer by the Court, he consulted his counsel and responded in the same manner. A lenghty recess intervened. Brunner resumed the stand and was asked:

Q. "Calling your attention to the years 1937 through 1939, were you acquainted with the defendant Sidney Weinbaum in Pasadena, California?" A. "Yes, I know Sidney Weinbaum."

Later the reporter read the following question to the witness, which had been asked before by the United States Attorney:

Q. "Did you, during that same period of time, ever see the defendant at meetings of the Communist Party?" Brunner said: "I must decline to answer that on the ground that it might incriminate me."

The witness gave no ground for his refusal to answer. The Court made it clear that Brunner was directed to answer, stating there was "no present danger in the witness' testifying," and that the chances of incriminating himself were remote. Thereupon, since Brunner remained recalcitrant, he was sentenced for contempt to a period of six months "unless prior to the expiration of this trial you purge yourself of such contempt by voluntarily offering to answer such questions as were propounded to you."

Brunner appealed from this judgment and was released on bail by this Court.

The validity of the claim of a witness in a criminal trial to immunity from giving testimony on the ground that the answers might incriminate him depends upon principles which have long been settled in law. If, in fact, the danger to the witness is once made apparant, great latitude is allowed to him in judging for himself what may be the effect of his answer. Even a question which is at first sight an innocent one may require an answer which will constitute a link in a chain of evidence leading to conviction of the witness. But it is well established that the witness is not the sole judge of whether he should be accorded the privilege of silence. The trial judge must necessarily be the arbiter and weigh the good or bad faith of the witness in his refusal and whether there is a bare possibility of legal peril or, on the other hand reasonable ground to apprehend danger sufficient to require that the witness be afforded protection.

This Court, many years ago, determined in a case which had no political implications that this "was a matter to be determined by the trial court in the exercise of sound discretion." Judge Mathews, speaking for this Court, in Miller v. United States, 95 F. 2d 492, 493, and citing Mason v. United States, 244 U. S. 362, 364, 37 S. Ct. 621, 61 L. Ed. 1198, and United States ex rel., Vajtauer v. Commissioner, 273 U. S. 103, 113, 47 S. Ct. 302, 306, 71 L. Ed. 560.

The claim of counsel for Brunner was that the

latter might be prosecuted under the Smith Act and that acts in the years 1937 and 1938 were at times used as a basis for charges of conspiracy under that Act, and that the Attorney General has been preparing criminal prosecutions against thousands of persons who were active members of the Communist Party.

There was no Smith Act in those years, since the date of passage was June 28, 1940.

The trial judge called attention to the fact that members of the Communist Party in those years had recently avowed their previous membership and were cleared of stigma and that some had testified in the very trial which was then in progress.

In sound discretion, the judge could determine whether the claim was made in good faith to prevent self-incrimination of the witness or was used as a cloak in order to attempt to save Sidney Weinbaum from conviction for prejury.

It is, of course, possible that a prosecution could be brought against Brunner for conspiracy to overthrow the Government of the United States, but the answers to the questions here propounded would not have connected him with a conspiracy. No conspiracy to violate the terms of the Smith Act could be prosecuted for those years. It is true that a conspiracy to overthrow the Government of the United States by force and violence might have existed then and, if proven to have continued to the present time, could be prosecuted now. Member-

ship in the party alone would not constitute a link in that chain.

We accept as still law of this circuit the determination of this Court in Healey v. United States, 186 F. 2d 164; Alexander v. United States, 181 F. 2d 480, and Kasinowitz v. United States, 181 F. 2d 632. But, in the situation there involved each witness before the Grand Jury was faced with a present danger that he might himself be indicted. In that circumstance he was entitled and required to refuse to testify. United States v. Johnson, 76 F. Supp. 538, 540, 1947. But here prosecution of Brunner was not threatened on any charge. In fact, it is more reasonable to believe that greater peril of prosecution lay in the refusal to testify.

Finally, it is said the trial judge confused civil and criminal contempt in the sentence imposed. In Mason v. United States, supra, each of the witnesses before a Grand Jury was asked whether he saw anyone playing poker and whether he saw anyone playing a game of cards at the table at which he was sitting. The trial judge held contemptuous the refusal of each witness to answer these two questions and ordered "that they each be fined in the sum of one hundred dollars and that they each be imprisoned until they comply with the orders of the court by answering the questions." If Judge Harrison was confused, his confusion was based upon that of the Supreme Court of the United States in 1916. Actually, no confusion existed in either instance. The judgment was a penalty payable to the United States with mitigation in the

event Brunner purged himself by complying within the requisite time.

We find the trial judge exercised sound discretion in requiring the witness to answer and in determining that there was no substance to the claim of the witness that the answers might incriminate him, that the claim was made in bad faith; and that the judgment was proper and should be carried out. Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed.

Affirmed.

[Endorsed]: Opinion. Filed May 18, 1951. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 12672

EUGENE M. BRUNNER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 18, 1951.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, October 26, 1951.

Before: Mathews and Stephens, Circuit Judges;
Fee, District Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of Mathews, Circuit Judge, and Fee, District Judge, It Is Ordered that the petition of appellant, filed June 18, 1951, and within time allowed therefor by rule of court, and valid extensions thereof, for a rehearing of above cause be, and hereby is denied.

Judge Stephens, voting to grant the petition for a rehearing.

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 37 pages, numbered from and including 1 to and including 37, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of November, 1951.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 442

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 28, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
NOV 28 1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 442

EUGENE M. BRUNNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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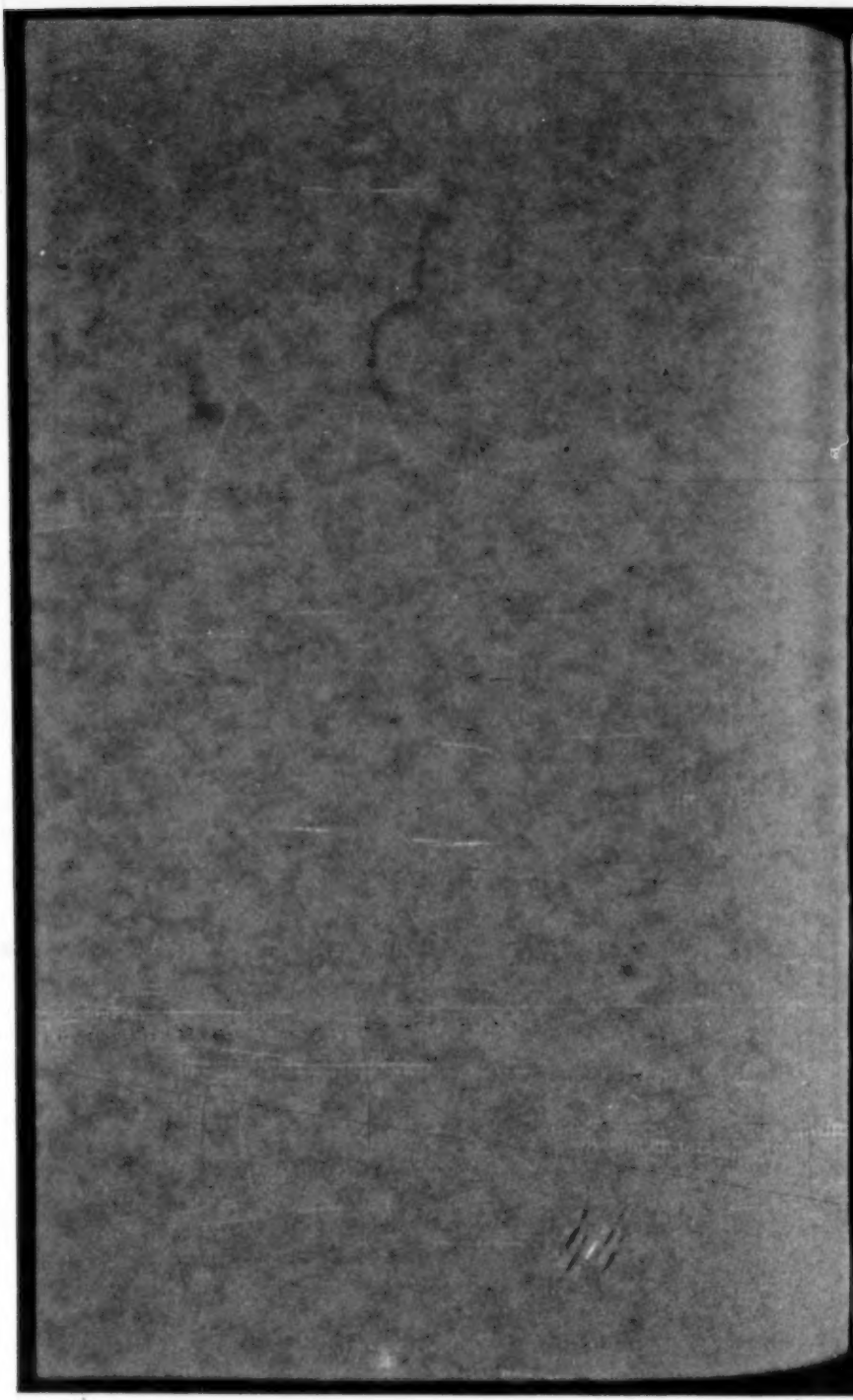

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

EUGENE M. BRUNNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Ninth Circuit, entered on May 18, 1951 [R. 36], which judgment affirmed conviction of petitioner for contempt of the District Court of the United States, for the Southern District of California, Central Division.

Opinion Below.

The opinion of the United States Court of Appeals, Ninth Circuit is officially reported at 190 F. 2d 167.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 18, 1951 [R. 36], and the order denying petition for rehearing was entered on October 26, 1951 [R. 37]. The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1). See also Rule 42(a), Federal Rules of Criminal Procedure.

Statement of Matters Involved.

On August 30, 1950, petitioner, having been subponaed as a Government witness [R. 3] in the case of *United States of America, Plaintiff, v. Sidney Weinbaum, Defendant,* No. 21408 Criminal, presented himself on that date and was sworn as a witness on the following day. The proceedings before the court and jury involved charges of perjury against the defendant Weinbaum, the indictment alleging, among other things, that Weinbaum had falsely sworn to non-membership in the Communist Party.

After the usual preliminary matters, petitioner was asked these questions [R. 10, 11]:

(a) Between the years 1937 and 1938[1] were you a member of the Communist Party in Pasadena, California? [R. 10.]

(b) Did you during that same period of time ever see the defendant [Weinbaum] at meetings of the Communist Party? [R. 11.]

---

[1]The certificate, judgment and commitment for contempt [R. 5] incorrectly refers to the year *1939*.

Petitioner, in both instances, declined to answer, claiming his constitutional privilege against self-incrimination. Upon being directed to answer by the trial court, petitioner again declined, and again, in both instances claimed the privilege. The trial court found him guilty of contempt and sentenced him to six months imprisonment, with the proviso that petitioner might "purge" himself by answering prior to the expiration of the trial [R. 7]. The trial concluded a few days later with no offer by petitioner to "purge" himself.

Constitutional Provisions and Statutes Involved.

1. The Fifth Amendment to the United States Constitution as it relates to the protection against self-incrimination.

2. Rule 42(a) Federal Rules of Criminal Procedure, as it relates to punishment for contempt.

Questions Presented.

1. Whether in a criminal trial, a witness is justified in refusing to answer questions concerning membership in, or attendance at meetings of, the Communist Party on a claim of privilege against self-incrimination, the witness having offered to make showings respecting analogous facts and holdings in the United States Court of Appeals, Second Circuit,[2] in the Fifth Circuit,[3] and in the

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[2]*U. S. v. Rosen*, 174 F. 2d 187; *Dennis v. U. S.*, 183 F. 2d 201 (conviction affirmed 341 U. S. 494).

[3]*Estes v. Potter*, 183 F. 2d 865.

Ninth Circuit;[4] the witness also having offered to show that the Government in the *Dennis* case *(supra)*, had adduced evidence of events antedating enactment of the Smith Act[5] [R. 16]; that the Department of Justice had announced the preparation of twelve thousand (12,000) prosecutions against "persons who are active members of the Communist Party and similar organizations, or who appear to be acting in concert with Russian interests" [R. 17, 18, 19],[6] that the presumption of a continuing conspiracy as announced by the Ninth[7] and followed by the Second Circuit,[8] added to petitioner's peril.

2. Whether a witness, after claiming his privilege under the Fifth Amendment may be imprisoned under Rule 42(a), when the sole purpose of his imprisonment, as disclosed by the findings and the formal commitment order by the trial court, was to coerce answers and not to punish for past conduct.

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[4]*Kasinowitz v. U. S.*, 181 F. 2d 632; *Alexander v. U. S.*, 181 F. 2d 480.

[5]18 U. S. C. 2385.

[6]Hearings Appropriations Committee of the House, 81st Congress, Second Session, page 86.

[7]*Marino v. U. S.*, 91 F. 2d 691.

[8]*Sperry Gyroscope v. NLRB*, 129 F. 2d 922, 927.

Reasons for Granting Writ.

I.

A. The decision of the court below conflicts with its own opinions in the *Alexander (supra)*, *Kasinowitz (supra)* and *Healey*[9] cases; with the rule in the Fifth Circuit,[10] and in the Second Circuit.[11]

B. The decision of the court below appears to be a departure from law as heretofore determined by this Court where similar issues were involved.

C. The issues are of grave public importance in that constitutional rights affecting all the people are here involved.

II.

A. Notwithstanding petitioner's express claim of privilege and the showings offered by his counsel, the court below asserts "The witness gave no ground for his refusal to answer" [R. 31].

B. The Court of Appeals erroneously ruled that the trial court's finding of "bad faith" and "no present peril" was non-reviewable.

III.

Because the court below has cited, with approval, authorities by this Court and others, but has in fact arrived at conclusions contrary to said authorities; moreover it

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[9]*Healey v. U. S.*, 186 F. 2d 164.

[10]*Estes v. Potter, supra.*

[11]*U. S. v. Rosen, supra.*

has announced a rule [R. 34] which has no support in the law—that petitioner ought to have risked the lesser peril of incrimination to avoid the "greater peril of prosecution" for contempt.

IV.

One of the three Justices affirming the conviction below voted to grant the petition for rehearing [R. 37].

Conclusion.

For the reasons stated we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM B. ESTERMAN,
Attorney for Petitioner.

A. L. WIRIN,
Attorney American Civil Liberties Union, Southern California Branch,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

EUGENE M. BRUNNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinion Below and Jurisdiction.

The opinion below and the basis of this Court's jurisdiction are set forth in the petition.

Specification of Errors.

I.

The Court of Appeals erred in rejecting petitioner's claim of privilege against self-incrimination.

A. The court's finding that petitioner gave no ground for his refusal to answer is not comportable with the record.

B. The court incorrectly concluded that the trial court could weigh petitioner's good faith and distinguish be-

tween a "reasonable ground" for apprehension and a "bare possibility" of legal peril notwithstanding that the court concedes that a witness is permitted wide latitude once the danger is apparent, even though the answer sought might be but a link in a chain of circumstances ultimately leading to a conviction.

C. The court erred in concluding that it is bound by the trial court's finding of no present peril to the witness; that the finding is conclusive and should not be disturbed.

D. The court erred in finding that the passage of the Smith Act in 1940 eliminated all possibility of self-incrimination through the answering of questions addressed to the 3-year period next preceding 1940.

E. The conclusions of the court are not compatible with the cases cited, and they are at variance with the language of the opinion.

II.

The Court of Appeals erred in concluding that the trial court's offer to release petitioner from custody, if he answered the questions before the conclusion of the trial, was merely an attempt at mitigation, rather than an attempt to coerce answers by offering the petitioner his liberty in exchange for a waiver of his right to invoke the Fifth Amendment.

ARGUMENT.

I.

The Court of Appeals Erred in Rejecting Petitioner's Claim of Privilege Against Self-Incrimination.

A. The Court's Finding That Petitioner Gave No Ground for His Refusal to Answer Is Not Comportable With the Record.

Under the Fifth Amendment to the Constitution of the United States "no person . . . shall be compelled in any criminal case to be a witness against himself." As an integral part of the Bill of Rights this amendment constitutes a limitation on the exercise of Federal power.

> "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles (of the Fourth and Fifth Amendments) established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."
>
> *Weeks v. U. S.*, 232 U. S. 383, 393, L. R. A. 1915B 834, Ann. Cas. 1915C 1177.

This Court has construed this provision to mean that a witness cannot be compelled in *any* proceeding to answer questions which would disclose facts tending to show the commission of a criminal offense or any element thereof, or any matter which would constitute a link in a chain of evidence establishing the commission of an offense, or any facts which would constitute an eviden-

tiary lead to the existence of facts constituting such proof.[12]

In the *Blau* case,[13] decided by this Court on December 11, 1950, wherein the witness declined on constitutional grounds to answer questions concerning the Communist Party and her employment by it, this Court said:

> "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation (or conspiracy to violate) the Smith Act. Prior decisions of this court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent. The attempt by the courts below to compel petitioner to testify runs counter to the Fifth Amendment as it has been interpreted from the beginning." (Citing cases.)

The petitioner herein based his refusal to answer upon the adequately stated ground that he feared his answers might tend to incriminate him [R. 10-11-12]. The statement [R. 31] in the opinion of the Court of Appeals that "the witness gave no ground for his refusal to answer" seems capricious in the light of the record. As this Court said in the *Blau* case, *supra*:

> "The holding below also was in conflict with recent decisions of the Fifth and Ninth Circuits" (citing the *Estes* and *Alexander* cases, *supra*).

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[12]*Counselman v. Hitchcock*, 142 U. S. 547; *Ballmann v. Fagin*, 200 U. S. 186.

[13]338 U. S. 851.

B. The Court Incorrectly Concluded That the Trial Court Could Weigh Petitioner's Good Faith and Distinguish Beween a "Reasonable Ground" for Apprehension and a "Bare Possibility" of Legal Peril Notwithstanding That the Court Concedes That a Witness Is Permitted Wide Latitude Once the Danger Is Apparent, Even Though the Answer Sought Might Be but a Link in a Chain of Circumstances Ultimately Leading to a Conviction.

Long-established principles accord the claim of privilege against self-incrimination a much higher dignity than was extended here either by the trial court or the Court of Appeals.[14] Nor does the factual context in this proceeding warrant the casual treatment accorded to the petitioner's claim of privilege. At the very time when the trial court was directing petitioner to answer, upon pain of punishment, the conviction in the *Dennis* case, *supra,* had been affirmed in the Second Circuit [R. 16] and the office of the United States Attorney General had announced that the Criminal Division had *ready for prosecution* some 12,000 cases against "members of the Communist Party who can be shown to be sympathetic and appreciative of its views" [R. 17]. Although the trial court permitted no detailed showing as to the *Dennis* case, *supra,* this Court can certainly take judicial notice of the fact that one of the charges in one of the indictments in that case read as follows:

> "The defendant herein *has been* a member of said Communist Party of the United States of America, the defendant well knowing during all said period

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[14] *Regina v. Boyes,* 1 Best and S. 311; *U. S. v. Burr,* 25 Fed. Cas. 38; *Ballmann v. Fagin, supra; U. S. v. St. Pierre,* 132 F. 2d 837 (C. C. A. 2) (writ granted and dismissed, 313 U. S. 41); *Arndstein v. McCarthy,* 254 U. S. 71; *U. S. v. Zwillman,* 108 F. 2d 802 (C. C. A. 2); *U. S. v. Weisman,* 111 F. 2d 260 (C. C. A. 2); *Matter of Doyle,* 257 N. Y. 244 (opinion by Cardozo, J.).

> that said Communist Party of the United States of America *was and is* a society . . . of persons who teach and advocate the overthrow of the government of the United States by force and violence." (Italics ours.)

In this context, the trial court improperly exercised the prerogative of "weighing" petitioner's good faith. As this Court said in the *Blau* case, *supra*:

> "These provisions [of the Smith Act] made future prosecution of petitioner far more than 'a mere imaginary possibility.' Mason v. U. S., 244 U. S. 362, 366."

Nor is "bareness" of possibility a measure of peril. The proper rule is, as the Court of Appeals concedes by its citations, that the danger is real where there is *any* possibility; once the danger is "apparent, great latitude is allowed to him in judging for himself what may be the effect of his answer. Even a question which is at first sight an innocent one may require an answer which will constitute a link in a chain of evidence leading to conviction of the witness"[15] [R. 32]. On this record silence is not a "privilege" as the court would have it [R. 32]. The Fifth Amendment, as we have shown, is an integral part of the Bill of *Rights,* and no court has the power to water down the *right* of silence by characterizing it as a *privilege,* to be extended or withheld from an American citizen according to the dictates of topical wisdom. The right to amend the Constitution is exclusively inherent in the people; we suggest, most respectfully, that the rationalizations here employed are "as curious as they are novel."

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[15]N. B.: Compare this statement of the Court below with its statement [R. 34], "But here prosecution of Brunner was not threatened on any charge" (discussed in this brief below).

C. The Court Erred in Concluding That It Is Bound by the Trial Court's Finding of No Present Peril to the Witness; That the Finding Is Conclusive and Should Not Be Disturbed.

It is manifest error to conclude that the trial court's "finding" may not be reviewed. No law is cited by the court in support of this statement nor have we been able to find any. Since a Federal right is involved, *i. e.*, a protection against all Federal officials, including judges, it can hardly be urged that this right may be foreclosed at any level below the one at which petitioner now seeks relief. The reasons for granting relief here are no less compelling than in the *Blau* case, *supra*, where this Court said:

> "We granted certiorari because the decision appeared to deny rights guaranteed by the Fifth Amendment."

The statement in the opinion below [R. 34]

> "In fact, it is *more reasonable* to believe that *greater peril* of prosecution lay in the refusal to testify." (Italics ours.)

compounds the error by placing upon petitioner the unheard of burden of weighing the perils with which he is confronted. It was never intended by the framers of our Constitution that any of its guarantees *might have to be abandoned in order to assure their preservation.*

That the danger need not be an imminent one is also well established. The danger that petitioner might be prosecuted was neither more nor less present than in the *Healey, Alexander* and *Kasinowitz* cases which the Court

of Appeals cites with approval [R. 34]. Nor did the Ninth Circuit in those cases draw any line between the danger of *immediate* prosecution and *future* prosecution. The holdings in those cases were unequivocal as to the reality of the danger of prosecution or indictment *at any time.* What the court below describes as a "present" danger was a circumstance which the petitioners therein, for purposes of emphasis, called to the attention of the Ninth Circuit. Moreover, this Court in the *Blau* case, *supra,* expressly made reference to *future* prosecutions in sustaining the petitioner's claim of privilege.

D. The Court Erred in Finding That the Passage of the Smith Act in 1940 Eliminated All Possibility of Self-incrimination Through the Answering of Questions Addressed to the 3-year Period Next Preceding 1940.

The opinion below contains the following statement [R. 31]:

> "The court made it clear that Brunner was directed to answer, stating there was 'no present danger in the witness testifying,' and that the chances of incriminating himself were remote."

With this statement should be read the remarks of the trial court [R. 20]:

> ". . . *it seems to me* that there is no present danger in the witness testifying concerning those years . . . In my opinion, the chances of incriminating [himself] are so remote that *any private interest here must give way to the public interest in inquiring into and ascertaining the truth.*" (Italics ours.)

Constitutional prohibitions against compulsory self-incrimination are not "private interests" to be subordinated to the "public interest" in the manner that private property is condemned to make way for public construction. Inalienable rights, such as those embodied in the Fifth Amendment, are not, unless the Constitution exists in a perfect vacuum, to be subordinated to *any* interest, public or otherwise. More accurately, if the Constitution means anything at all, it is in the public interest that private rights *not* give way. If this be true, then the trial court has placed its endorsement upon the popular, hysterical and dangerous legend that to espouse an unpopular idea is to waive one's rights to the substantive and procedural protections of our fundamental charter.

Apart from the fact that the gratuitous remarks of the trial court do not constitute "findings" in any procedural sense, they surely may not be regarded as the kind of guarantee which might replace the Fifth Amendment. A guarantee, like an immunity statute, "must in effect be a 'general amnesty' available to the witness."[16] This was no "general amnesty"; indeed it does not rise even to the dignity of the promises of the District Attorney (not to use the answers of the witnesses as a lever for prosecution) with which the Ninth Circuit dealt so sharply in the *Alexander* case, *supra*. That, as the trial court said [R. 20], "other witnesses have testified" is of no moment. Our concern here is not with the virtues which may or

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[16]*Brown v. Walker*, 161 U. S. 591.

may not attach to willing disclosure. *The question is whether the Government can compel disclosures.* We respectfully insist that it cannot.

The issue of "remoteness" is not a valid one. In the *Blau* case this Court endorsed the refusal of the witness to answer this question—among others:[17]

> "were you *ever* employed by the Communist Party of Colorado." (Italics ours.)

As we have shown above, the charges in the *Dennis* case took no cognizance of any chronological dividing line. Surely no other interpretation is possible considering as petitioner pointed out [R. 16] that the Government in that case adduced evidence without any time restrictions, self-imposed or otherwise. This Court may take judicial notice of the fact that the prosecutor successfully offered as evidence *against the defendants,* the Communist Manifesto, written over one hundred years ago. Objections of defense counsel were fruitless notwithstanding that Karl Marx had *died 66 years before the trial began, and before any of the defendants on trial were born.*

It is well established in the Ninth Circuit, and petitioner so stated [R. 18], that a conspiracy once established is presumed to continue until the contrary is established.[18]

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[17]See footnote number 2 in that opinion.

[18]*Marino v. U. S.*, 91 F. 2d 691 (C. C. A 9, 1937); see also *Sperry Gyroscope v. NLRB*, 129 F. 2d 922, 927 (C. C. A. 2, 1942).

We find no Federal cases holding that the statute of limitations relating to a specific crime may be urged as a bar to a claim of privilege. Logic, however, dictates that it may not so be urged because the Fifth Amendment prohibits compulsory *self-incrimination* in any proceeding, not *self-conviction*. The witness is not required to assert or show that he might be convicted, and even in a case where his answers might disclose matters leading to an unsuccessful prosecution because he were to plead the statute of limitations, "At least he would be obliged to plead the statute of limitations, and, if the crime were infamous, an acquittal on such a plea would be scarcely better than a conviction."[19]

E. The Conclusions of the Court Are Not Compatible With the Cases Cited, and They Are at Variance With the Language of the Opinion.

We have already dealt in some detail with the inconsistencies in the opinion of the court below. We shall not labor them. We should, however, point out that one more statement at least represents a new departure.

After admitting the possibility [R. 33] "that a prosecution could be brought against Brunner for a conspiracy to overthrow the government of the United States," the court below asserts that "answers to the questions here propounded would not have connected him with a con-

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[19] *McFadden v. Reynolds* (Pa.), 11 Atl. 638. See 70 C. J. 731.

spiracy." That [R. 34] "membership in the Party alone *would not constitute a link in that chain.*" (Italics ours.)

In view of the unequivocal holding, in the *Blau* case, *supra,* which this Court announced *five months* before the order of the court below, to whose attention petitioner commended that opinion, petitioner is driven to the gloomy conclusion that, in our over-weaning preoccupation with "the Red menace" we may unwittingly remove from the body of our law the classic challenge of Justice Cardozo in the *Doyle* case:

> "We are not unmindful of the public interests, of the insistent hope and need that the ways of bribers and corruptionists shall be exposed to an indignant world. Commanding as those interests are, they do not supply us with a license to palter with the truth or to twist what has been written in the statutes into something else that we should like to see. Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' (Holmes, J., in Northern Securities Co. v. U. S., 193 U. S. 197, 400), are not to change their form and content in response to the 'hydraulic pressure' (Holmes, J., *supra*) exerted by great causes."
>
> *Matter of Doyle,* 257 N. Y. 244.

II.

Where the Purpose of Imprisonment for Contempt Is to Coerce Performance of an Affirmative Act the Contempt, if Any, Is Not Punishable Under Rule 42(a), Federal Rules of Criminal Procedure; the Contempt, if Any, Is Civil and Cannot Extend Beyond the Duration of the Particular Proceedings.

The findings and judgment of contempt [R. 4, 20] disclose an attempt to fix *in advance* a punitive punishment in anticipation of the possibility that the remedial and coercive punishment might not prove efficacious.

> "It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. * * * The order for imprisonment in this class of

> cases, therefore, is not to vindicate the authority of the law, but is remedial and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said *In re Nevitt,* 117 Fed. Rep. 451, 'he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do."
>
> *Gompers v. Bucks,* 221 U. S. 418, 441.

Because the six months' sentence was *alternative and conditional,* it was intended to *coerce answers* in aid of the Government, a party to the litigation before the Court. That the District Court offered petitioner his liberty if he should yield, can mean only that the Court wanted *answers.* The Court would not otherwise have *argued* with the witness by pointing out (a) that the danger was remote, (b) that Mr. Pressman had spoken out, and (c) that in the Court's opinion petitioner's private interest would have to give way to the public interest [R. 19-20]. If as the Government contends, petitioner had committed an offensive act which *could not be undone*—a crime—he would have been punished summarily and *unambiguously.* The *argument* of the Court and the *conditional sentence* of the Court were both *coercive;* when one didn't work, the Court used the other.

Petitioner respectfully submits that neither the terms of Rule 42(a) nor any known precedents warrant the imposition of punitive punishment *before* the conduct of petitioner had ripened into a crime. The entire record and the only expressed intendments of the District Judge

show an intention to coerce answers by handing him the "keys of his prison," fixing *in advance* a determinate sentence of six months for *anticipated* recalcitrance, and imposing as a condition of his earlier release a surrender of petitioner's constitutional right to protection against self-incrimination.

Conclusion.

It is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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Attorney American Civil Liberties Union, Southern California Branch,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 442

EUGENE M. BRUNNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 30-35) is reported at 190 F. 2d 167.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1951 (R. 36), and a petition for rehearing was denied on October 26, 1951 (R. 37). The petition for a writ of certiorari was filed on November 23, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner, a witness in a criminal trial in 1950, was justified in refusing to answer (a) whether he was a member of the Communist Party in 1937 and 1938, and (b) whether during the same period he ever saw the defendant at meetings of the Communist Party, on the ground that his answers might tend to incriminate him of a conspiracy in violation of the Smith Act.

2. Whether an order imposing imprisonment for criminal contempt can validly be conditioned on the continued refusal of the witness to answer the question.

STATUTES INVOLVED

The Smith Act of June 28, 1940, 54 Stat. 671, 18 U.S.C. (1946 ed.) §§10, 11, provides:[1]

> Sec. 2. (a) It shall be unlawful for any person—
>
> (1) to knowingly or wilfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;
>
> (2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display

[1] These sections are now consolidated, with changes in phraseology only as 18 U.S.C. 2385, except that the conspiracy clause of Section 3 is "omitted [from § 2385] as covered by the general conspiracy provision [§ 371]." See Reviser's note.

any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

* * * * *

Sec. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

18 U.S.C. 401 provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

* * * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42(a) of the Federal Rules of Criminal Procedure provides:

A criminal contempt may be punished summarily if the judge certifies that he saw or

heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

Petitioner was subpoenaed as a witness on behalf of the Government in the trial in August 1950 of one Sidney Weinbaum who had been charged with perjury (R. 3-4, 30). In the course of his examination under oath, petitioner was asked the following questions (R. 10-11) which he refused to answer:

> (1) Between the years 1937 and 1938 were you a member of the Communist Party in Pasadena, California?
>
> (2) Did you during that same period of time ever see the defendant [Weinbaum] at meetings of the Communist Party?

Petitioner declined to answer either of these questions on the ground that his answers might tend to incriminate him. The trial court directed him to answer. After he again declined (R. 5-6, 11-12) the court, after hearing counsel for petitioner (R. 12-20), entered the following order (R. 7):

> It Is Ordered, Adjudged and Decreed that the said Eugene Brunner is guilty of contempt of this Court.
>
> It Is Further Ordered, Adjudged and Decreed that the said Eugene Brunner is hereby

committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months in the Los Angeles County Jail, Los Angeles, California, unless prior to the expiration of the trial of the case of United States of America v. Sidney Weinbaum, No. 21408 Criminal, the said Eugene Brunner should purge himself of this contempt by voluntarily offering to answer the aforesaid questions.

The trial of Weinbaum concluded several days later with no offer having been made by petitioner to purge himself (see Pet. 3). Instead, he immediately appealed to the Court of Appeals for the Ninth Circuit which unanimously affirmed the conviction (R. 36).

ARGUMENT

1. Membership in the Communist Party in 1937 and 1938 was not a crime. The Smith Act, *supra,* pp. 2-3), the only law under which such membership could in any circumstances constitute a crime, was not passed until 1940. It was not intended to operate retroactively and could not constitutionally have been made to so operate. Petitioner's claim is that the admissions sought by the questions put to him would be a link in the chain of evidence needed to sustain a prosecution against him for conspiring to violate the Smith Act. Reasoning from the fact that in *Dennis* v. *United States*, 341 U.S. 494, evidence of things done by the defendants during years before 1940 was admitted to prove the

conspiracy there charged, he urges that pre-1940 membership in the Party would be equally useful to build a case of conspiracy against him. The suggestion seems to be that 1938 membership indicates 1938 participation in a conspiracy, which, in turn, indicates continued participation down to a period within the three-year statute of limitations, i.e., to a time after August 1947, which was three years prior to the time petitioner refused to testify.[2] The tenuous character of this argument is obvious. Petitioner does not suggest that membership in 1938 proves membership in 1947. Recent world history, too familiar to require elaboration (see Jackson, J., concurring, in *American Communications Assn.* v. *Douds*, 339 U.S. 382, 427), is alone enough to negative any such inference.

The argument that petitioner might have participated in a conspiracy in 1938 and continued in it through 1947 is even weaker. The probabilities of his continuance in a conspiracy are subject to the same weaknesses as the probabilities that he would have remained a member.[3] But beyond that, there

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[2] Any violation of the Smith Act would be subject to the three-year statute of limitations. 18 U.S.C. (1946 ed.) 582; 18 U.S.C. (1948 rev.) 3282. The constitutional privilege cannot, of course, be invoked in respect of offenses, prosecution of which is barred by the statute of limitations. *Brown* v. *Walker*, 161 U.S. 591, 598.

[3] The cases petitioner cites to support his argument that once a conspiracy is shown it is presumed to continue involved definite showings of original complicity. See *Marino* v. *United States*, 91 F. 2d 691 (C.A. 9). Moreover, the presumption petitioner draws takes no account of the significant events of recent years which bear on the likelihood of continued association with the Party.

is no basis to assume that all members of the Communist Party were conspirators (cf. *Dennis* v. *United States*, 341 U.S. at 516). There is no reason at all on the present record to assume that petitioner occupied any special status in the Party.

The decision of this Court in *Patricia Blau* v. *United States*, 340 U.S. 159, and the lower court cases which it sustains (*Estes* v. *Potter*, 183 F. 2d 865 (C.A. 5), certiorari denied, 340 U.S. 920; *Alexander* v. *United States*, 181 F. 2d 480 (C.A. 9); cf. *Healey* v. *United States*, 186 F. 2d 164 (C.A. 9) are distinguishable. In the *Blau* case, for example, it was held that disclosure of possession of the records of the Communist Party of Colorado or intimate knowledge of its internal affairs, it organization and the whereabouts of its records, could reasonably give rise to fear of future prosecution for having knowingly advocated the desirability of overthrowing the Government by force or violence; or for organizing or helping to organize a society or group which teaches, advocates or encourages such overthrow of the Government; or for being a member of such a group with knowledge of its purpose. But the questions asked Patricia Blau tended to show much more than mere membership, and they were asked at a time within which the statute of limitations had not yet run. Of course, mere membership within the period of limitations would not be enough to sustain a conviction. *A fortiori*, the mere membership in 1938, which was beyond the limitations period, would not. Cf. *Schneider-*

man v. *United States*, 320 U.S. 118, 146-147, 158.

This Court has admonished that the constitutional privilege against self-incrimination "is confined to real danger and does not extend to remote possibilities out of the ordinary course of law," *Heike* v. *United States*, 227 U.S. 131, 144, a rule which was applied to conclude that a grand jury witness would not expose himself to a charge of having engaged in illegal gambling by admitting his presence at a table where such gambling was taking place. *Mason* v. *United States*, 244 U.S. 362, 365; cf. *The Queen* v. *Boyes*, 1 B. & S. 311, 329-330, 121 English Reports (Full Reprint) 730. The continuing force of those principles has recently been recognized by this Court. *Hoffman* v. *United States*, 341 U.S. 479, 486. If the factual situations in those cases involved no danger to the witnesses we submit there was no danger to petitioner in the instant case. Moreover, this Court has also made it clear, in resolving problems in this field, that great weight will be given to the conclusions drawn by the judge who met the situation on its facts. See *Mason* v. *United States*, *supra*, at 366; *Hoffman* v. *United States*, *supra*, at 487; cf. *Irvine, Ex parte*, 74 Fed. 954, 960 (C.C. S.D. Ohio).

The decision below is not inconsistent with *United States* v. *Rosen*, 174 F. 2d 187 (C.A. 2), certiorari denied, 338 U.S. 851, upon which petitioner also relies. In that case the connection of the witness with a possible Communist conspiracy

was far more concrete than a mere admission that the witness was a member of the Party and attended a few of its meetings. The facts of that case show readily enough how different it is. In hearings before a committee of the House of Representatives, conflicting testimony had been given by Whittaker Chambers and Alger Hiss on the issue whether Hiss had passed certain confidential State Department documents to Chambers. Investigation of the respective claims of Hiss and Chambers disclosed that title to a car Hiss claimed to have turned over to Chambers had in fact passed from Hiss to an auto dealer to Rosen.[4] Chambers further testified that Hiss had, against Party rules, insisted on turning the car over to the Party "so it could be of use to some poor organizer in the West or somewhere," and that this was in fact done through Party machinery. It was also shown that the auto dealer to whom Hiss transferred the car kept a record of all cars which passed through its hands; and that although its records for that day and for a reasonable time before and after were examined and found to show no inherent evidence of any abstraction, it had no record concerning this car.

These facts, the further fact that evidence has been produced which tended to show that in and

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[4] The Court of Appeals for the Second Circuit specifically pointed out that if this were all that had appeared, Rosen's claim of privilege could not have been sustained. 174 F. 2d at 190.

after 1935, Hiss had been guilty of violating the laws relating to espionage and had been guilty of conspiring with others to violate such laws, and the fact that an indictment had been returned against Hiss, were held to constitute sufficient basis for Rosen's claim of privilege. It was pointed out that the testimony sought to be elicited from Rosen as to his connection with the car might tend to show his participation as a co-conspirator in a conspiracy which might well have continued to a period within the statute of limitations.

The concrete nature of the evidence adduced of a possible conspiracy and of Rosen's possible participation in it, as well as its intricate and serious nature, contrast sharply with the limited information sought from petitioner.[5]

2. Petitioner's second contention seems to be that the option given him by the court to purge himself by answering the challenged questions before the end of the trial was invalid because an order for imprisonment in a criminal contempt proceeding may not properly be conditioned on the continued refusal of the witness to answer. Consequently, he argues, sentence was imposed before the conduct became a crime. In support of his second contention, petitioner cites the case of *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S.

[5] There is no need to make separate analysis of the second question asked petitioner. Its danger, if any, arises from the inference to be drawn from petitioner's attendance at meetings that he was a member of the Party.

418, which deals with the confusing problem of distinguishing civil and criminal contempts, and concludes that the order entered was improper. The differences between civil and criminal contempts are not involved here. Cf. *Gompers* v. *Buck's Stove & Range Co., supra.* The punishment was for a criminal contempt. This contempt was complete when petitioner disobeyed the court's direction that he answer the questions. The option to purge himself is not a new provision in criminal contempt orders. See, e.g., *Clay* v. *Waters,* 178 Fed. 385 (C.A. 8). Cf. *Mason* v. *United States,* 244 U.S. 362, 364. If there was an indirect coercive effect in this option, it was neither improper nor materially greater than is necessarily incident to any contempt order. Even if the court had entered an unconditional order, it cannot be supposed that it would not have been authorized to reduce the sentence in the event that petitioner should purge himself (see Rule 35, F.R. Crim. P.) so that he might be freed. The order actually entered was not materially different.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1952

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IN THE

Supreme Court of the United States

October Term, 1951

No. 442

EUGENE M. BRUNNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 18, 1951 [R. 36] and the order denying Petition for Re-hearing was entered on October 26, 1951, Circuit Judge Stephens voting to grant the petition [R. 37]. This court made its order granting certiorari on January 28, 1952 [R. 38]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1). (See also Rule 42(a), Federal Rules of Criminal Procedure.)

OPINION BELOW.

The opinion of the United States Court of Appeals, 9th Circuit, is officially reported at 190 F. 2d 167.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The Fifth Amendment to the United States Constitution as it relates to the protection against compulsory self-incrimination.

2. Rule 42(a), Federal Rules of Criminal Procedure as it relates to punishment for contempt.

SPECIFICATION OF ERRORS.

I.

The Court of Appeals Erred in Rejecting Petitioner's Claim of Privilege Against Self-incrimination.

A. The Court incorrectly concluded that the trial court could weigh petitioner's good faith and distinguish between a "reasonable ground" for apprehension and a "bare possibility" of legal peril; notwithstanding that the court concedes that a witness is permitted wide latitude once the danger is apparent, even though the answer sought might be but a link in a chain of circumstances ultimately leading to a conviction.

B. The Court's finding that petitioner gave no ground for his refusal to answer is not comportable with the record.

C. The Court erred in concluding that it is bound by the trial court's finding of no present peril to the witness; that the finding is conclusive and should not be disturbed.

D. The Court erred in finding that the passage of the Smith Act in 1940 eliminated all possibility of self-incrimination through the answering of questions addressed to a 3-year period next preceding 1940.

II.

The Court of Appeals Erred in Concluding That the Trial Court's Offer to Release Petitioner From Custody, if He Answered the Questions Before the Conclusion of the Trial, Was Merely an Attempt at Mitigation, Rather Than an Attempt to Coerce Answers in Aid of the Prosecution.

QUESTIONS PRESENTED.

1. Whether in a criminal trial, a witness is justified in refusing to answer questions concerning membership in, or attendance at meetings of, the Communist Party on a claim of privilege against self-incrimination, the witness having offered to make showings respecting analogous facts and holdings in the United States Court of Appeals, Second Circuit,[1] in the Fifth Circuit,[2] and in the Ninth Circuit;[3] the witness also having offered to show that the Government in the *Dennis* case (*supra*) had adduced evidence of events antedating enactment of the Smith Act[4] [R. 16]; that the Department of Justice had announced the preparation of twelve thousand (12,000) prosecutions against "persons who are active members of the Communist Party and similar organizations, or who appear to be acting in concert with Russian in-

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[1]*United States v. Rosen*, 174 F. 2d 187; *Dennis v. United States*, 183 F. 2d 201 (conviction affirmed, 341 U. S. 494).

[2]*Estes v. Potter*, 183 F. 2d 865 (cert. den.).

[3]*Kasinowitz v. United States*, 181 F. 2d 632; *Alexander v. United States*, 181 F. 2d 480.

[4]18 U. S. C. 2385.

terests" [R. 17, 18, 19],[5] that the presumption of a continuing conspiracy as announced by the Ninth[6] and followed by the Second Circuit,[7] added to petitioner's peril.

2. Whether a witness, after claiming his privilege under the Fifth Amendment may be imprisoned under Rule 42(a) when the sole purpose of his imprisonment, as disclosed by the findings and the formal commitment order of the trial court, was to coerce answers and not to punish for past conduct.

STATEMENT.

On August 30, 1950, petitioner, having been subpoenaed as a Government witness [R. 3] in the case of *United States of America, Plaintiff v. Sidney Weinbaum, Defendant,* No. 21408 Criminal, presented himself on that date and was sworn as a witness on the following day. The proceedings before the court and jury involved charges of perjury against the defendant Weinbaum, the indictment alleging, among other things, that Weinbaum had falsely sworn to non-membership in the Communist Party.

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[5]Hearings Appropriations Committee of the House, 81st Congress, Second Session, p. 86.

[6]*Marino v. United States,* 91 F. 2d 691.

[7]*Sperry Gyroscope v. N. L. R. B.,* 129 F. 2d 922, 927.

After the usual preliminary matters, petitioner was asked these questions:

(a) Between the years 1937 and 1938[*] were you a member of the Communist Party in Pasadena, California? [R. 10].

(b) Did you during that same period of time ever see the defendant (Weinbaum) at meetings of the Communist Party? [R. 11].

Petitioner, in both instances, declined to answer, claiming his constitutional privilege against self-incrimination. Upon being directed to answer by the trial court, petitioner again declined, and again, in both instances claimed the privilege. The trial court found him guilty of contempt and sentenced him to six months imprisonment, with the proviso that petitioner might "purge" himself by answering prior to the expiration of the trial [R. 7]. The trial concluded a few days later with no offer by the petitioner to "purge" himself.

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[*]The certificate, judgment and commitment for contempt [R. 5] incorrectly refers to the year *1939*.

SUMMARY OF ARGUMENT.

I.

The Court of Appeals Erred in Rejecting Petitioner's Claim of Privilege Against Self-incrimination.

A. The court incorrectly concluded that the trial court could weigh petitioner's good faith and distinguish between a "reasonable ground" for apprehension and a "bare possibility" of legal peril; notwithstanding that the court concedes that a witness is permitted wide latitude once the danger is apparent, even though the answer sought might be but a link in a chain of circumstances ultimately leading to a conviction.

B. The court's finding that petitioner gave no ground for his refusal to answer is not comportable with the record.

C. The court erred in concluding that it is bound by the trial court's finding of no present peril to the witness; that the finding is conclusive and should not be disturbed.

D. The court erred in finding that the passage of the Smith Act in 1940 eliminated all possibility of self-incrimination through the answering of questions addressed to the 3-year period next preceding 1940.

II.

Where the Purpose of Imprisonment for Contempt Is to Coerce Performance of an Affirmative Act the Contempt, If Any, Is Civil and Cannot Extend Beyond the Duration of the Particular Proceedings.

ARGUMENT.

I.

The Court of Appeals Erred in Rejecting Petitioner's Claim of Privilege Against Self-incrimination.

A. The Court Incorrectly Concluded That the Trial Court Could Weigh Petitioner's Good Faith and Distinguish Between a "Reasonable Ground" for Apprehension and a "Bare Possibility" of Legal Peril; Notwithstanding That the Court Concedes That a Witness Is Permitted Wide Latitude Once the Danger Is Apparent, Even Though the Answer Sought Might Be but a Link in a Chain of Circumstances Ultimately Leading to a Conviction.

The courts below seem to hold to the view that the privilege was not available to petitioner because any answers he might give would not show *the commission of a crime;* the theory that the indicated answer might not show a crime constitutes, as we shall show, a restricted view of the privilege, and is not consistent with well-established law to the effect that a witness is not required to furnish a link in a chain of evidence which *might* lead to prosecution, *whether the prosecution be successful or not.*

Petitioner respectfully suggests that the Court below improperly exercised the prerogative of "weighing" petitioner's good faith. A future prosecution of the petitioner under the Smith Act, was, as this Court said in the *Blau* case[9] very well more than "a mere imaginary possibility." Nor is "bareness" of possibility a measure of peril. The Court below concedes in its opinion that the danger is real where there is *any* possibility of prosecution; once the

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[9] *(Patricia) Blau v. United States,* 340 U. S. 332.

danger is "apparent, great latitude is allowed to him in judging for himself what may be the effect of his answer. Even a question which is at first sight an innocent one may require an answer which will constitute a link in a chain of evidence leading to conviction of the witness" [R. 32].

While it is true that a court may investigate as to whether a witness who claims the privilege is protecting himself or is seeking to benefit others who are not protected, where it otherwise appears that an answer may tend to incriminate the witness, the Court cannot deny the privilege on the ground that it was pleaded in bad faith, merely to save another, and not to protect the witness himself from prosecution.[10] "In this setting it was not 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer cannot possibly have such tendency' to incriminate."[11] Here, again, this Court asserted, as it did in the *Blau* case, *supra,* that "the privilege * * * embraces those [answers] which would furnish a link in the chain of evidence needed to prosecute the claimant for a Federal crime."—See *Hoffman v. United States, supra,* at page 486.

How far the courts are willing to go in protecting a witness against possible incrimination is demonstrated by the recent case of *United States v. Rosen* (C. C. A. 2d) 174 F. 2d 187, cert. den. 338 U. S. 851. There, the witness refused to answer certain questions before a Grand Jury relating to the sale of a second-hand Ford car by

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[10]*Ex parte Irvine* (1896, C. C. Ohio), 74 Fed. 954 (opinion by Taft, Circuit Judge).

[11]*Samuel Hoffman v. United States,* 341 U. S. 479, 488.

Alger Hiss in 1936. Testimony had been adduced tending to show that at that time Hiss had been engaged in espionage, and perhaps other crimes, against the United States. It had also been alleged that the car in question had been transferred "indirectly" to the Communist Party. In sustaining the claim of privilege the Court pointed out that even though the statute of limitations had long since run on any substantive crime he might have committed when the car was transferred to him, he was still not immune to prosecution. Said the Court:

> "The evidence which tends to show that Hiss was guilty of criminal conspiracy may also show, or be supplemented to show, that such conspiracy has continued to exist and to be carried out ever since or at least to a date not now affected by any statute of limitations. Such evidence may show that the appellant was and perhaps is, a co-conspirator in that or related conspiracies for which he may be prosecuted."

B. The Court's Finding That Petitioner Gave No Ground for His Refusal to Answer Is Not Comportable With the Record.

Under the Fifth Amendment to the Constitution of the United States "no person . . . shall be compelled in any criminal case to be a witness against himself." As an integral part of the Bill of Rights this amendment constitutes a limitation on the exercise of Federal power.

> "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles [of the Fourth and Fifth Amendments]

established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

Weeks v. United States, 232 U. S. 383, 393, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.

This Court has construed this provision to mean that a witness cannot be compelled in *any* proceeding to answer questions which would disclose facts tending to show the commission of a criminal offense or any element thereof, or any matter which would constitute a link in a chain of evidence establishing the commission of an offense, or any facts which would constitute an evidentiary lead to the existence of facts constituting such proof.[12]

The assurances of the trial court that petitioner might safely answer the questions can no more replace petitioner's rights under the Fifth Amendment than could the assurances of the United States Attorney in the matter of *Rogers v. United States,* 179 F. 2d 559 (C. C. A. 10), wherein the Court said, "It was not for him to say what the scope of the grand jury's investigation was; neither was his statement a substitute for her constitutional protection." A guarantee, like an immunity statute, "must in effect be a general amnesty available to the witness." (*Brown v. Walker,* 161 U. S. 591.)

The assurances of the trial court that "other witnesses have testified" [R. 20] is likewise no substitute for the

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[12]*United States v. Burr (In re Willie),* 25 Fed. Cas. 38; *Counselman v. Hitchcock,* 142 U. S. 547; *Brown v. Walker,* 161 U. S. 591; *Ballmann v. Fagin,* 200 U. S. 186; *Hale v. Henkel,* 201 U. S. 43; *Mason v. United States,* 244 U. S. 362; *United States v. Zwillman,* 108 F. 2d 802; *United States v. Weisman,* 111 F. 2d 260; *Smith v. United States,* 337 U. S. 137; *Hoffman v. United States, supra.*

Fifth Amendment. We are not here concerned with the virtue which may attach to voluntary disclosure. *The question is whether the government can compel disclosures.* The Fifth Amendment says it cannot, and the claim of privilege against compulsory self-incrimination has consistently been accorded a much higher dignity than was petitioner's claim.[13]

We cannot agree with the finding of the Court of Appeals that "the witness gave no ground for refusal to answer" [R. 31]. As to each of the questions propounded to him, petitioner correctly and respectfully assigned his refusal on grounds of possible self-incrimination [R. 5, 6, 10, 11, 12]. In the brief time allowed him petitioner offered to make showings [R. 16, 17, 18] respecting holdings in the *Rosen, Dennis, Estes, Kasinowitz, Alexander, Marino* and *Sperry* cases, *supra,* as well as the announcement of the Department of Justice that it had in preparation 12,000 prosecutions against "persons who are active members of the Communist Party and similar organizations, or who appear to be acting in concert with Russian interests."[14]

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[13]*Regina v. Boyes,* 1 Best and S. 311; *United States v. Burr, supra; Ballmann v. Fagin, supra; United States v. St. Pierre,* 132 F. 2d 837 (C. C. A. 2) (writ granted and dismissed, 313 U. S. 41); *Arndstein v. McCarthy,* 254 U. S. 71; *United States v. Zwillman, supra; United States v. Weisman, supra; Matter of Doyle,* 257 N. Y. 244 (opinion by Cardozo, J.).

[14]See footnote 5, *supra.*

C. The Court Erred in Concluding That It Is Bound by the Trial Court's Finding of No Present Peril to the Witness; that the Finding Is Conclusive and Should Not Be Disturbed.

It was error for the Court below to conclude that the district judge could make a non-reviewable finding as to the possible peril, or lack of it, confronting the petitioner. The right involved under the Fifth Amendment is a right which precludes encroachment by all federal officials including judges; it can hardly be urged that this right may be foreclosed at any level below the one in which petitioner now seeks relief. The decision of the Court of Appeals expressly denies rights guaranteed by the Fifth Amendment.

In *Estes v. Potter, supra,* the Court of Appeals held that questions addressed to a witness seeking to learn whether he knew another alien, whether that alien was a member of the Communist Party, whether he contributed funds to the Communist Party, and whether he attended meetings of the Communist Party, would tend to show that the witness was a member of, or affiliated with, the Communist Party and that the witness therefore could claim the protection of the Fifth Amendment. The Court said in part:

> "It is palpably inconsistent, in one breath, to urge that being a Communist is a ground for deportation for belonging to a group that encourages the overthrow of the government by force; and, in the next breath, to argue that it may not incriminate one to be compelled to testify that he is a Communist, knows Communists, or has attended a meeting of Communists. Yet, this seems to be the position of appellee; it would be idle merely to ask the witness if he knew

> the aliens and, upon his answering yes, then to stop his examination; and the law never requires the doing of an idle thing."

The statement in the opinion below [R. 34]:

> "In fact, it is *more reasonable* to believe that *greater peril* of prosecution lay in the refusal to testify." (Italics ours.)

compounds the error by placing upon petitioner the unheard of burden of weighing the perils with which he is confronted. It was never intended by the framers of our Constitution that any of its guarantees *might have to be abandoned in order to assure their preservation.*

That the danger need not be an imminent one is also well established. The danger that petitioner might be prosecuted was neither more nor less present than in the *Healey, Alexander* and *Kasinowitz* cases, *supra,* which the Court of Appeals cites with approval [R. 34]. Nor did the Ninth Circuit in those cases draw any line between the danger of *immediate* prosecution and *future* prosecution. The holdings in those cases were unequivocal as to the reality of the danger of prosecution or indictment *at any time.* What the Court below describes as a "present" danger was a circumstance which the petitioners therein, for purposes of emphasis, called to the attention of the Ninth Circuit. Moreover, this Court in the *Blau* case, *supra,* expressly made reference to *future* prosecutions in sustaining the petitioner's claim of privilege.

In (*Patricia*) *Blau v. United States, supra,* wherein the witness declined on constitutional grounds to answer ques-

tions concerning the Communist Party and her employment by it, this Court said:

> "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation (or conspiracy to violate) the Smith Act. Prior decisions of this court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent. The attempt by the courts below to compel petitioner to testify runs counter to the Fifth Amendment as it has been interpreted from the beginning." (Citing cases.)

It is to be noted that included in the questions which Patricia Blau declined to answer on constitutional grounds was this one, "Were you *ever* employed by the Communist Party of Colorado?" (Italics ours.)

D. The Court Erred in Finding That the Passage of the Smith Act in 1940 Eliminated All Possibility of Self-incrimination Through the Answering of Questions Addressed to the 3-year Period Next Preceding 1940.

It is well established that "a conspiracy once established is presumed to continued until the contrary is established."[15] A conspirator may avoid guilt by withdrawing from the conspiracy, but affirmative action on the part of the ac-

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[15] *Marino v. United States, supra.* See, also, *Coates v. United States,* 59 F. 2d 173.

cused is required to show withdrawal from the conspiracy.[16]

In *Sperry v. N. L. R. B., supra,* wherein the Court enforced an order of the N. L. R. B. directing the disestablishment of a company dominated union, the Court said:

> "In actions for criminal conspiracy (where the penalties are penal and far more severe than under N. R. L. A.) it has often been held that, if once it be shown that a person has been a member of a conspiracy, his continued connection therewith will be 'presumed,' *i. e.,* the jury may properly infer that continuation. Such a person then has 'the burden' of overcoming that inference. He may do so by proving that he had ceased to participate. Proof of that fact may take the form of a public disavowal of any further connection with the other conspirators. But, notwithstanding such a disavowal, the jury may find that his participation did not end. The question of whether the disavowal was effective in accomplishing a severance of the former relation is one of fact for the jury."

Having concluded that a disavowal was ineffective, a jury would then have the right to avail itself of the presumptive continuance of the conspiracy and convict on the basis of membership in the Communist Party two or three, or even more, years before the Smith Act became law.

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[16] *Hyde v. United States,* 225 U. S. 347. See, also, *Marino v. United States* and *Coates v. United States, supra.*

In *United States v. Kissel,* 218 U. S. 601, 607, 608, 610, wherein defendants, charged with an unlawful conspiracy in restraint of trade in refined sugar sought to interpose a plea of the statute of limitations, the Court (opinion by Justice Holmes) struck down the plea saying in part:

> "It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. United States v. Irvine, 98 U. S. 450, 25 L. ed. 193, 3 Am. Crim. Rep. 334. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one. . . .
>
> ". . . A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although contituted by a contract is not the contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes . . .
>
> ". . . All that we decide is that a conspiracy may have continuance in time and that where, as

here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue, and not by a special plea. Under the general issue all defenses, including the defense that the conspiracy was ended by success, abandonment, or otherwise, more than three years before July 1, 1909, will be open and unaffected by what we now decide."

In the *Alexander* case, *supra*, the Ninth Circuit, distinguishing its holding from the *Mason* case, *supra*, said:

"Here is not the 'merely remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by' of Mason v. United States, 244 U. S. 362, 366. Here is exactly the prosecution that a *reasonable* man would expect if actually guilty of conspiracy or association with conspirators to violate the Smith Act or one innocently associating with such conspirators and ceasing the association on discovery of its unlawful character. Such a conspiracy prosecution as here feared has no semblance to the possible prosecution for violating the Alaska gambling statute in the Mason case. At that time there was in Alaska no such general conspiracy statute as that for defrauding the United States nor a specific statute against conspiring to engage in a gambling game, such as the conspiracy statute in the instant case."

In *United States v. Zwillman, supra* (1940), the witness was asked the names of his business associates in the years between 1928 and 1932. He declined to an-

swer, asserting his privilege. In argument upon the hearing in the District Court, counsel for the defendant stated the defendant had been in the liquor business until 1933, *i. e.*, during years when such business was illegal. This was the sole evidence from which the Court could have inferred incrimination. Yet the defendant's claim of privilege was upheld, on the ground that discovery of defendant's associates in those years might incriminate him in a conspiracy to violate the liquor and revenue laws.

A statute of limitations is equivalent to an act of amnesty when the crime erased by lapse of time is one standing by itself, and is not a clue to the commission of other crimes thereafter.[17] Clearly it is no such equivalent when the crime is a continuing conspiracy, unaffected by any limitation till the combination is abandoned.[18]

In the *Dennis* case, *supra* (certiorari granted on other grounds, conviction affirmed), the challenge of the defense that the trial court had not sufficiently limited the evidence in point of time was met by the Second Circuit with the following statement:

> ". . . there can be no logical reason for limiting evidence to prove that the defendants were in a conspiracy between 1945 and 1948 to the period of the charge; if they were in the conspiracy earlier, declarations of any one of them or of any other person acting in concert with them are as competent

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[17]*Brown v. Walker, supra;* 4 Wigmore on Evidence, Sec. 2279.

[18]*United States v. Kissel, supra.*

as those made within the period laid. Whether they are relevant depends upon how far they form a rational support for believing that the conspiracy continued to 1945; but it is nonsense to say that events occurring before a crime, can have no relevance to the conclusion that the crime was committed; and declarations are no different from any other evidence. How far back of the commission of the crime one may go is a matter of degree, and within the general control of the judge over the relevancy of evidence. In the case at bar, there is not the least reason to hold that his discretion was abused. The same doctrine applies to evidence occurring before the acts charged had become a crime at all: *e. g.*, in the case at bar the visits of some of the defendants to Moscow before 1940. Just as in the case of events occurring before the dates laid in the indictment, so events occurring before the conspiracy had become a crime may have logical relevance to the conclusion that the conspiracy continued until after 1940."

It should be noted, too, that one of the specifications in the Dennis indictment charged:

"The defendant herein *has been* a member of said Communist Party of the United States of America, the defendant well knowing during all said period that said Communist Party of the United States of America *was and is* a society . . . of persons who teach and advocate the overthrow of the government of the United States by force and violence." (Italics ours.)

II.

Where the Purpose of Imprisonment for Contempt Is to Coerce Performance of an Affirmative Act the Contempt, if Any, Is Not Punishable Under Rule 42(a), Federal Rules of Criminal Procedure; the Contempt, if Any, Is Civil and Cannot Extend Beyond the Duration of the Particular Proceedings.

The form of the findings and judgment of contempt [R. 4, 20] raise a question as to whether the district judge sought to punish petitioner for a civil contempt or a criminal contempt. Viewed in the context of the entire record petitioner respectfully submits that what the trial judge *attempted* to do was to fix, *in advance,* a punitive punishment for criminal contempt in anticipation of the possibility that the remedial and coercive punishment might not achieve compliance with the Courts' direction to answer the questions. It is clear from the language of the order that petitioner was given his choice between alternative punishments and it can only be concluded therefore, that the sole purpose of the alternative and conditional sentence was to coerce replies in aid of the Government, a party to the litigation before the Court. The district judge offered petitioner his liberty if he would answer, saying in effect "I am sending you to jail and you will stay there for six months but you don't have to."

> "It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive,

and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. * * * The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said *In re Nevitt,* 117 Fed. Rep. 451, 'he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do."

Gompers v. Bucks, 221 U. S. 418, 441.

In distinguishing between civil and criminal contempt in *Parker v. United States,* 153 F. 2d 66 (C. C. A. 1), January 11, 1946, the Court pointed out that proceedings in civil contempt are "nominally those of contempt" the real purpose of the Court's order being purely remedial, to coerce obedience.

"* * * If imprisonment is imposed in civil contempt proceedings *it cannot be for a definite term* (citing cases). The respondent can only be imprisoned to compel his obedience to a decree. If

> he complies or shows that compliance is impossible, he must be released, for his confinement is not as punishment for an offense of a public nature. * * * On the other hand a proceeding in a criminal contempt is a separate and independent proceeding at law with the public on one side and the respondent on the other. The purpose of sentence in such a proceeding 'is punitive in the public interest, to vindicate the authority of the court and to deter other like derelictions.' Therefore in such a proceeding imprisonment may be imposed for *a definite term.*" (Italics ours.)

The conclusion is inescapable that the trial court wanted *answers* from petitioner, and that the order of commitment was intentionally laid in the alternative against the time when petitioner might have been persuaded by the arguments of the trial judge that (a) There was no danger, (b) that others had spoken out and (c) that there was a public interest which superseded petitioner's private interest [R. 19, 20]. Both the *argument* of the trial judge and the *conditional sentence* were *coercive* and the imprisonment of petitioner should in no event, have continued beyond the *Weinbaum* trial, which was concluded in two or three days.

> "A commitment for civil contempt is intended, not to punish, but to coerce the defendant. Since he can discharge himself by doing what he had previously refused to do, it is said he carries the key to his prison in his own pocket. On the other hand, a sentence for criminal contempt is not intended to coerce. It is pure punishment to vindicate the court's authority and dignity, and *it cannot be ended or shortened by any act of the defendant.*" (*Duell v. Duell,* 178 F. 2d 683, 684. (Italics ours.))

In the *Gompers* case, *supra,* Samuel Gompers and others were found guilty of contempt for disobeying an injunction and the order of commitment in that case was unqualified and *contained no provision for release,* should the prisoners purge themselves of contempt. The order, therefore, was clearly criminal in form and serves further to emphasize the distinction hereinabove quoted.

Petitioner herein was actually punished punitively before his conduct had ripened into a crime because the only expressed intendments of the District Judge show an intention to coerce answers by handing him the "keys of his prison," fixing *in advance* a determinate sentence for *anticipated* later disobedience. Petitioner earnestly contends that there is no place in our system of jurisprudence for the punishment of criminal acts before they are committed.

Conclusion.

At stake here are serious constitutional questions which affect all Americans. The prohibition against compulsory self-incrimination is firmly rooted in our fundamental law and was expressly placed there to prevent the kind of compulsion to which petitioner was here subjected. If the Fifth Amendment to the United States Constitution is to remain meaningful, the answers sought from petitioner were beyond the reach of the government and the attempt to compel answers constituted a clear encroachment on petitioner's rights.

The judgment herein should be reversed.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 442

EUGENE M. BRUNNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 30-35) is reported at 190 F. 2d 167.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1951 (R. 36), and a petition for rehearing was denied on October 26, 1951, one judge dissenting (R. 37). The petition for a writ of certiorari was filed on November 23, 1951, and was granted on January 28, 1952 (R. 38). The

jurisdiction of this Court rests on 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner's assertion of the privilege against self-incrimination justified his refusal, as a witness in a perjury trial in 1950, to state whether he had been a member of the Communist Party in 1937 and 1938 and whether he had seen the defendant at Communist Party meetings during the years 1937 through 1939.

2. Whether the sentence of six months' imprisonment imposed upon petitioner for criminal contempt of court was invalidated by the provision in the sentence for the termination of such imprisonment if he voluntarily answered the questions prior to the end of the trial.

STATUTES INVOLVED

The Smith Act of June 28, 1940, 54 Stat. 671, 18 U.S.C. (1946 ed.) 10, 11, 13(a) provides:[1]

> Sec. 2. (a) It shall be unlawful for any person—
>
> (1) to knowingly or wilfully advocate, abet, advise, or teach the duty, necessity, desirability, or proporiety of overthrowing or destroying any government in the United States by

[1] These sections are now consolidated, with changes in phraseology only, as 18 U.S.C. 2385, except that the conspiracy clause of Section 3 is "omitted [from § 2385] as covered by the general conspiracy provision [§ 371]." See Reviser's note.

force or violence, or by the assassination of any officer of any such government;

(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

* * * * *

Sec. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

* * * * *

Sec. 5(a) Any person who violates any of the provisions of this title shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than ten years, or both.

* * * * *

18 U.S.C. 3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 35 of the Federal Rules of Criminal Procedure provides:

> * * * The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 42(a) of the Federal Rules of Criminal Procedure provides:

> A criminal contempt may be punished sum-

marily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

Petitioner was subpoenaed in 1950 as a witness on behalf of the Government in the trial of one Weinbaum (R. 3-4), upon charges that Weinbaum had committed perjury before an Army review board to which Weinbaum had appealed upon denial to him of access to classified government information. Weinbaum had also been charged with falsification of his Personnel Security Questionnaire. The perjury and falsification consisted, *inter alia,* of concealment of Weinbaum's membership and activities in the Communist Party during and about the years 1937 and 1938. Weinbaum was convicted, and sentenced to four years' imprisonment.[2] In the course of the examination of petitioner as a witness, the following occurred (R. 10-11):

> Q. Between the years 1937 and 1938 were you a member of the Communist Party in Pasadena, California?
>
> A. I feel I must decline to answer that on the ground that it might incriminate me.
>
> * * * * *

[2] *United States* v. *Weinbaum,* No. 21408 CD (S.D. Cal.), not reported; the indictment is set forth in the Appendix, *infra,* pp. 39-45.

Q. (By Mr. Erickson): Calling your attention to the years 1937 through 1939 were you acquainted with the defendant Sidney Weinbaum in Pasadena, California?

A. Yes; I knew Sidney Weinbaum.

Q. Did you during that same period of time ever see the defendant at meetings of the Communist Party?

* * * * *

The Witness: I must decline to answer that on the ground that it might incriminate me.

Petitioner "gave no ground for his refusal to answer" (R. 15, 31) but his counsel's argument in support of petitioner's claim of privilege against self-incrimination (R. 12-19) included citation of various authorities,[3] and an extensive quotation from *McFadden* v. *Reynolds*, 11 Atl. 638 (Sup. Ct. of Pa.) to the effect that offenses barred by the statute of limitations could be the subject of self-incrimination because of the infamy involved, which quotation was offered with the comment that the case "has language which I [petitioner's counsel] think expresses our views pretty concisely" (R. 13). Petitioner's counsel also quoted and paraphrased portions of the testimony of a rep-

[3] Including *United States* v. *Rosen*, 174 F. 2d 187 (C.A. 2), certiorari denied, 338 U.S. 851; *Kasinowitz* v. *United States*, 181 F. 2d 632 (C.A. 9), certiorari denied, 340 U.S. 920; *Alexander* v. *United States*, 181 F. 2d 480 (C.A. 9); *Estes* v. *Potter*, 183 F. 2d 865 (C.A. 5), certiorari denied, 340 U.S. 920; *United States* v. *Dennis*, 183 F. 2d 201 (C.A. 2), affirmed, 341 U.S. 494.

resentative of the Department of Justice in January 1950, in hearings before the Subcommittee of the House Appropriations Committee, to indicate to the court that 12,000 cases against Communist Party members "sympathetic and appreciative of" the party views, were "ready for prosecution" dependent upon the outcome of the *Dennis* decision, *supra,* in the Supreme Court (R. 16-19),[4] and petitioner's counsel contended that while "[t]here is a presumption that [a one-time member of the party] no longer is that, * * * in practice I regret to say there seems to be the assumption that once affiliated always affiliated * * *" (R. 18).

The trial judge entered the following order (R. 7):

> It Is Ordered, Adjudged and Decreed that the said Eugene Brunner is guilty of contempt of this Court.
>
> It Is Further Ordered, Adjudged and Decreed that the said Eugene Brunner is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months in the Los Angeles County Jail, Los Angeles, California unless prior to the expiration of the trial of the case of United States of America v. Sidney Weinbaum, No. 21408 Criminal, the said Eugene Brunner should purge himself

[4] We do not agree with this interpretation of the Department of Justice testimony (see *infra*, pp. 27-29) but seek here only to summarize what was presented to the trial judge.

of this contempt by voluntarily offering to answer the aforesaid questions.

The trial concluded several days later with no offer on the part of petitioner to answer the questions (see Pet. 3). Upon appeal, the Court of Appeals unanimously affirmed the conviction (R. 36). A petition for rehearing was denied, one judge voting to grant the petition (R. 37).

SUMMARY OF ARGUMENT

I

The privilege against self-incrimination did not justify petitioner's refusal, as a witness in 1950 in the trial of Weinbaum for perjury, to answer questions as to whether petitioner had been a member of the Communist Party in 1937 or 1938 and whether he had seen Weinbaum at Communist Party meetings during the years 1937 through 1939. While petitioner claims that affirmative answers to these questions might tend to incriminate him under the Smith Act, that Act did not become law until 1940. Moreover, under the three-year statute of limitations applicable to the Smith Act, petitioner could not have been prosecuted for any acts which took place prior to 1947.

In some circumstances, evidence of Communist Party activities prior to the period of limitations or even prior to 1940 would be admissible in a Smith Act prosecution in 1950 or later. Where the earlier evidence placed a defendant in leader-

ship and conspiratorial activities, it would tend to show knowledge of the Party's objectives and continuous purpose and activity by the defendant. Affirmative answers to the questions addressed to the petitioner could have elicited no such information as to him. Little such probative value would attach to mere proof of membership in the Party in 1937 or 1938 and attendance at some of its meetings.

In *Mason* v. *United States,* 244 U. S. 362, it was held that the refusal to answer questions which could have elicited facts which did not constitute a crime was not justified by the privilege against self-incrimination, although those same facts would have been relevant under a charge of gambling. In the instant case, the danger of incrimination of the petitioner by affirmative answers is even more remote because of the fact that the questions related to matters in the years 1937-1939, at least eight years prior to the applicable period of limitations. It is this circumstance that distinguishes the instant case from *Blau* v. *United States,* 340 U.S. 159, and other cases relied upon by the petitioner, in which the witnesses were questioned as to their relationship with and knowledge of the Communist Party within the period of limitation.

In considering whether petitioner might have incriminated himself by affirmative answers to the questions, it is significant to note that momentous political events since 1939 and 1940 have imparted

to Communist Party membership prior to those years a far more ambiguous quality than in the case of later membership. Moreover, not until 1940 was it a Federal offense to advocate the violent overthrow of the government or to organize or be a member of a group which so advocates. The Smith Act has been interpreted as requiring both a specific criminal intent and a showing that the defendants' activities create "a 'clear and present danger' of the substantive evil which the legislature had the right to prevent." *Dennis* v. *United States,* 341 U.S. 494, 515. Clearly, mere membership in the Party and attendance at its meetings prior to 1940 at a time when neither was forbidden by Federal law cannot support a reasonable apprehension of danger from the disclosure of such facts. Also, it should be noted that the setting in which petitioner was questioned, i.e., the trial of Weinbaum for perjury, was one in which the issues as framed by the indictment restricted the information which relevantly could be sought from the petitioner.

The above circumstances alone sufficiently distinguish the present case from *United States* v. *Zwillman,* 108 F. 2d 802, and *United States* v. *Rosen,* 174 F. 2d 187, certiorari denied, 338 U.S. 851, in which the Second Circuit uniquely upheld the claim of privilege against questions relating to facts and events prior to the period of limitations. In both of those cases, the questions related directly or indirectly to matters which constituted

crimes when they occurred, and the questions were asked in the broader context of grand jury proceedings. Even more important, however, in each of those cases the Second Circuit required and relied upon a showing by the witness of actual or probable contemporaneous circumstances under which his answers even as to matters ostensibly barred by the statute of limitations would tend to endanger him. The petitioner has completely failed to make such a demonstration of danger, notwithstanding the running of the statute of limitations, as is required under the doctrine of the *Zwillman* and *Rosen* cases.

Abuse of the privilege against self-incrimination is always possible in that it may be asserted, not for the protection of the witness, but to protect someone else or for some other ulterior purpose. Where it appears that the questions are leading the witness on dangerous ground, the policy of the privilege sometimes can be effectuated only by permitting the witness to determine whether his answers would tend to incriminate him. Where explanation of his need for the privilege would destroy its protection, the chance is taken that in some instances the witness is really asserting the privilege for a purpose other than his own protection. However, where the incriminating power of certain facts has apparently been removed by the passage of time, or by a pardon, or by jeopardy, the policy of the privilege no longer

overrides the policy that the law is entitled to every man's evidence. In such cases, not only is the danger to the witness from the disclosure of such facts not apparent, but the likelihood that he is asserting the privilege for an ulterior purpose, such as the protection of some other person, is much greater. Effective judicial control of such possibilities of abuse can be had only by requiring the demonstration of current and real danger to the witness which was required in the *Zwillman* and *Rosen* cases. In the absence of such a showing, the courts below properly denied the petitioner's claim of the privilege against self-incrimination.

II

The petitioner was properly sentenced to six months imprisonment for criminal contempt of court. The option in the sentence which would have enabled him to terminate his imprisonment by volunteering to answer the questions, was in no way prejudicial to the petitioner. Under Rule 35, F. R. Crim. P., the trial court could have accomplished the same result by reducing the sentence of a contemnor who had subsequently obeyed the court's order. Federal courts have long imposed sentences for criminal contempt containing similar options to obtain reduction of sentences.

ARGUMENT

I

The Privilege Against Self-Incrimination Did Not Justify Petitioner's Refusal, During the Trial of Weinbaum in 1950, to State Whether Petitioner Had Been a Member of the Communist Party in 1937 and 1938 and Whether During the Years 1937 Through 1939 He Had Seen Weinbaum at Meetings of the Communist Party

The sole basis for the petitioner's assertion of the privilege against self-incrimination is that he might have incriminated himself under the Smith Act if, during the trial of Weinbaum in 1950, he had answered questions as to whether he was a member of the Communist Party in 1937 or 1938 and had seen Weinbaum at Communist Party meetings during the years 1937 through 1939. The court below, noting that the Smith Act was not enacted until June 28, 1940, and that "No conspiracy to violate the terms of the Smith Act could be prosecuted [for prior years]" (R. 33), affirmed the conclusion of the trial judge (R. 20) "that there is no present danger in the witness testifying concerning those years." We contend that the decision below is clearly correct. Specifically, we contend that in the circumstances of this case, including the nature of the questions and of affirmative answers to them, the fact that the questions related to a time prior to the Smith Act and the applicable period of limitations, the setting in which the questions were asked, and the remote relevance of affirmative answers to a future Smith Act prosecution, petitioner's claim of privilege was properly denied.

Unlike such cases as *Hoffman* v. *United States*, 341 U.S. 479, 488, it is unnecessary in the instant case to speculate as to the nature of the answers petitioner might have given to the questions which he refused to answer. The questions (R. 5) called for yes or no answers. Affirmative answers would have revealed that petitioner had been a member of the Communist Party sometime in 1937-1938 and that during 1937-1939 he had been present at one or more Communist Party meetings at which Weinbaum was also present. Previously, petitioner had stated that he knew Weinbaum (R. 11). Thus, the question is whether such answers would support petitioner's invocation of the privilege against self-incrimination in relation to the Smith Act, despite the circumstances that the Smith Act did not become law until June 1940, and that prosecutions under that Act are subject to a three-year statute of limitations (*supra*, pp. 3-4).

It is obvious that petitioner could not be prosecuted under the Smith Act for conduct occurring prior to the enactment of that statute. Also, it is well established that the privilege against self-incrimination cannot be asserted with respect to matters as to which prosecution is barred by the statute of limitaitons. *Brown* v. *Walker*, 161 U.S. 591, 598; *Robertson* v. *Baldwin*, 165 U.S. 275, 282; *Hale* v. *Henkel*, 201 U.S. 43, 66-67; and see 8 Wigmore, *Evidence* (3rd ed. 1940), p. 460 § 2279(c) [5]

[5] Petitioner has insisted upon a contrary rule before the trial judge (R. 13-14) and before this Court (Pet. 17) but has cited

Thus, at the time of Weinbaum's trial in August 1950, the statute of limitations precluded the prosecution of petitioner as to any matters occurring before August 1947. Petitioner does not now dispute either of these propositions.

However, petitioner contends that he was entitled to assert the privilege against self-incrimination because affirmative answers to the questions might be used to establish his participation in activities which, if continued after 1940, would constitute a conspiracy to violate the Smith Act and which, carried forward under a presumption of continuance, might subject him to prosecution within the three-year period of limitation.

It is clear that membership in the Communist Party and attendance at some Party meetings during the years 1937-1939 could not in themselves constitute the basis for a conviction under the

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as support for this view only a portion of a statement from 70 Corpus Juris 731 and an 1887 decision of the Pennsylvania Supreme Court, *McFadden* v. *Reynolds*. We find this decision reported only at 11 Atl. 638 and we do not find it cited as authority in any other decisions. Moreover, the full statement in 70 Corpus Juris holds the rule to be "generally" otherwise than that contended for by petitioner and stated in *McFadden* v. *Reynolds*. The McFadden reasoning, extensively quoted by petitioner to the trial judge (R. 13-14), relies primarily on the disgrace involved in having to plead the statute of limitations, but we find no expression of privilege as to that type of hardship in any federal decisions, except in two early lower court cases, *United States* v. *Craig*, 25 Fed. Cas. 682, 684, No. 14,883 (E.D. Pa., 1827); and *United States* v. *Dickinson*, 25 Fed. Cas. 850, 851, No. 14,958 (C. C. D. Ohio, 1840) which we must deem overruled by the decisions cited with approval by this Court in *Brown* v. *Walker*, *supra*, and the other, later pronouncements of this Court cited above.

Smith Act in 1950 or later. Of course, this does not mean it would always be irrelevant in a Smith Act prosecution to introduce evidence of a defendant's activities during a period prior to the limitation period or prior to enactment of the Smith Act. This was done in *United States* v. *Dennis,* 183 F. 2d 201 (C.A. 2), affirmed, 341 U. S. 494, to prove intent, but with respect to earlier activities of the defendants in that case going far beyond mere membership and attendance at party meetings. In the instant case, affirmative answers to the questions addressed to petitioner would not even remotely involve him in the leadership and conspiratorial activities which comprised the pre-statute of limitations evidence in the *Dennis* case.

Thus, the precise question here is whether the privilege against self-incrimination protects against disclosures of facts which constitute no element of a punishable offense, both because they occurred prior to the enactment of the Smith Act and because of the running of the statute of limitations, but which might be admissible in a later prosecution as evidence of knowledge, intent or purpose, or as the basis for a presumption of continued activity in violation of the Smith Act.

The controlling principles are well established. The privilege against self-incrimination protects a person only against criminal consequences. *Brown* v. *Walker,* 161 U.S. 591. In *In re Willie,* 25 Fed. Cas. No. 14692e, pp. 38, 39 (C.C.D. Va.), Chief Justice Marshall stated that "When two

principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded."

More recently, this Court has summarized the general principles evolved in many cases in *Hoffman* v. *United States,* 341 U. S. 479, 486-487, as follows:

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime (*Patricia*) *Blau* v. *United States,* 340 U.S. 159 (1950). But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *Mason* v. *United States,* 244 U.S. 362, 365 (1917), and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, *Rogers* v. *United States,* 340 U.S. 367 (1951), and to require him to answer if "it clearly appears to the court that he is mistaken." *Temple* v. *Commonwealth,* 75 Va. 892, 899 (1881).

> However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Insofar as this Court has considered the question, it has apparently held that the mere fact that an answer to a question may be admissible in evidence at a trial does not justify assertion of the privilege against self-incrimination. This result was first suggested in *In re Willie, supra,* in which Chief Justice Marshall stated (25 Fed. Cas. at p. 40) that:

> It would seem, then, that the court ought never to compel a witness to give an answer *which discloses a fact which would form a necessary and essential part of a crime* which is punishable by the laws. [Emphasis supplied.]

A clear implication of this statement is that the mere admissibility in evidence in some future trial of facts which are in no sense "a necessary and essential part" of any crime for which the witness can be prosecuted at the time the facts are sought, does not justify assertion of the privilege. At any rate, such a limitation of the privilege, on the

ground of the remoteness of the danger to the witness, was applied in *Mason* v. *United States,* 244 U.S. 362, where this Court held unanimously that a witness would not expose himself to danger by admitting that a card game had been played at a table where he was sitting. Manifestly, the fact that the witness was at the gaming table was a fact which would be admissible in evidence against him under a charge of gambling. The Court nevertheless found (p. 365) that "The constitutional protection against self-incrimination 'is confined to real danger and does not extend to remote possibilities out of the ordinary course of law' ", citing *Heike* v. *United States,* 227 U.S. 131, 144, and *Brown* v. *Walker,* 161 U.S. 591, 599, 600.

Applying these principles to the instant case, it may be conceded that if the questions addressed to petitioner related to a time within the statute of limitations, i.e., within three years prior to August 1950, he could properly assert the privilege of self-incrimination. *Blau (Patricia)* v. *United States,* 340 U.S. 159. Every question addressed to Mrs. Blau in that case (340 U.S. at 160) specifically or potentially called for answers which would indicate current "intimate knowledge" of the inner workings of the Communist Party. Similarly, questions as to the witness' activity in or intimate knowledge of the Communist Party within the three-year period of limitation were involved in most of the cases principally relied upon by petitioner, i.e. *Alexander* v. *United States,* 181 F. 2d 480 (C.A. 9, 1950), *Kasinowitz* v. *United States,* 181

F. 2d 632 (C.A. 9, 1950), *Estes* v. *Potter*, 183 F. 2d 865 (C.A. 5, 1950), and *Healey* v. *United States*, 186 F. 2d 164 (C.A. 9, 1950). In the instant case, the issue is whether there was sufficient likelihood in 1950 that petitioner's answers to questions relating exclusively to the years 1937-1939, prior to the enactment of the Smith Act and the applicable period of limitation, might tend to incriminate him. We contend that there was not.

In general, the Smith Act prohibits (1) advocating the overthrow or destruction of any government in the United States by force or violence, (2) organizing or helping to organize a society, group or assembly of persons to so advocate, (3) "to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof," and (4) attempts or conspiracies to do any of the foregoing. In proscribing only membership accompanied by knowledge of the society's purposes, Congress explicitly recognized the possibility of casual, innocent membership. To constitute an offense, each of the prohibited acts must be accompanied by a specific criminal intent and purpose to bring about the violent overthrow or destruction of the government, and must create "a 'clear and present danger' of the substantive evil which the legislature had the right to prevent." *Dennis* v. *United States*, 341 U. S. 494, 515. Moreover, in *Dennis* this Court warned that "Where there is doubt as to intent of the defendants, the nature of their activities, or their power to bring

about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." *Ibid.* at p. 516. Under this authoritative interpretion of the Smith Act, it is clear that petitioner's membership in the Communist Party in 1937 and 1938 and his attendance at party meetings during that period, if such are the facts, are far removed in time and probative value from being links in the chain of proof required to sustain a conviction.

In this connection, it is important to note that fundamental political changes and events since 1939 and 1940 have given to membership in the Communist Party during the preceding years a far more ambiguous character than in the subsequent years. It is a matter of common knowledge that during the depression years of the 1930s a number of people joined the Communist Party in search of remedies for serious economic problems. Others joined because of the militant Communist opposition to Fascism in some areas. A growing distrust of Communist tactics and objectives culminated in the Hitler-Stalin Pact of 1939—with the ensuing flipflop in the policy of the Communist Party of the United States. The net result by the time of the enactment of the Smith Act in June 1940 was that many people had left the Communist Party in disillusionment and disgust.

Moreover, not until the passage of the Smith Act in 1940 was it a Federal offense to advocate violent overthrow of the government, to organize a society to so advocate, or to be a member of such a

society with knowledge of its purposes. The net effect of the events culminating in 1940 is that evidence of membership in the Communist Party and of attendance at Party meetings prior to that date, absent evidence of similar conduct after 1940, would have so little probative weight in a Smith Act prosecution in 1950 or later, that its incriminating quality, in the speculative event of such a prosecution, would be nil. Also, it should be noted that affirmative answers to the questions asked petitioner could have in no way involved him in the organizing and leadership activities which would show knowledge of the party's true purposes or such intensity of purpose and activity as would support a presumption of continued conspiratorial activity.

It is also relevant to consider the nature of the proceeding in which petitioner asserted the privilege against self-incrimination. We do not suggest that the type of proceeding in which it is claimed determines the availability of the privilege. However, this Court stated in *Hoffman* v. *United States,* 341 U. S. 479, 486-487, that "the setting in which [the question] is asked" is to be considered in determining whether "a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result," and held that the setting in that case included the circumstance that the questions were asked in the course of "an investigation * * * [that] will run the gamut of all crimes cov-

ered by federal statute." In contrast, in the instant case, the petitioner was questioned in the course of the trial of Weinbaum under an indictment charging him with falsely stating that he had never been a member of the Communist Party when in fact he had been a member of the Communist Party during and about the years 1938 and 1939. Obviously, therefore, this was no occasion involving hot pursuit of the petitioner. More important, in sharp distinction from the general criminal investigation in *Hoffman*, the indictment in this case precisely limited the range of relevant questions to those relating to whether or not Weinbaum had been a member of the Party during and about the years 1938 and 1939. Petitioner does not contend that he was called as a witness for any purpose other than to obtain evidence relevant to the charges against Weinbaum.

In view of the foregoing circumstances, we contend that the likelihood that the petitioner would have been endangered by his answers to the questions addressed to him was too remote and conjectural to justify his assertion of the privilege against self-incrimination. However, petitioner relies heavily upon two decisions of the Court of Appeals for the Second Circuit, *United States* v. *Zwillman*, 108 F. 2d 802, and *United States* v. *Rosen*, 174 F. 2d 187, certiorari denied 338 U.S. 851, for the general proposition that he was entitled to claim the privilege with respect to matters in the years 1937 to 1939, upon the ground that his an-

swers might have implicated him in a conspiracy in those years which might later be charged to have continued to a time within the statute of limitations.

The *Zwillman* and *Rosen* cases upheld claims of privilege with respect to questions calling for answers as to facts and events preceding the period of limitation, upon the theory that the answers sought, *under the circumstances of those cases,* might have implicated the witnesses in criminal conspiracies which continued into the period of limitation. We believe that the doctrine of those cases, which is peculiar to the Second Circuit, is probably erroneous in that it upholds the assertion of the privilege in situations where the danger that the witness may incriminate himself is too remote and speculative. In any event, both the *Zwillman* and *Rosen* cases are clearly distinguishable from the present case. First, in both of those cases, the witnesses were asked the questions as to which they claimed the privilege in the course of grand jury proceedings. Thus, as in *Hoffman* v. *United States, supra,* and in contrast to the instant case, the setting was one in which the witnesses were or may have been potential defendants. Secondly, in both of those cases the witnesses justified or sought to justify their claims of privilege by pointing out fairly specifically their grounds for belief that they were threatened with real danger of self-incrimination. Thus, in *Zwillman,* the grand jury was inquiring in 1939

into criminal conspiracies against the United States, and Zwillman refused to list his business associates in the years 1928 through 1932. However, Zwillman's counsel stated that he had been in the liquor business prior to the repeal of the 18th Amendment in 1933, and offered to call a witness who had testified in another case that Zwillman and others had been engaged in illegal liquor activities during the last two years, *i.e.*, 1937 and 1939. Certainly, Zwillman, under these apparent circumstances, had far greater reason for apprehension than the petitioner in this case has offered.

In *United States* v. *Rosen, supra,* where the witness asserted the privilege with respect to questions as to facts and events preceding the period of limitations, the Court of Appeals stated (174 F. 2d at 188) that "As they do not on their face appear to call for answers which would tend to incriminate the appellant, it was incumbent upon him to justify his refusal to answer on the ground claimed by making it appear that his assertion that they would was based upon substantial reason so to believe and was not made merely to protect some other person or persons." Rosen had shown that in connection with the then-recent Congressional investigation of Alger Hiss and his indictment for perjury, a considerable mystery had developed as to whether and how a car once owned by Hiss had come to be registered in Rosen's name in 1936, a crucial period in the *Hiss* case. The questions which Rosen refused to

answer related to the car matter. Rosen's showing included a newspaper report that Rosen and his wife "had been linked closely to Commie underground workers whose activities overlapped those of persons with whom Hiss had been accused of associating in the Washington spy ring", as well as a Congressional subcommittee report that the "apparatus" of which Hiss had been claimed to have been a part had continued to operate at least as late as 1940 and that another "apparatus" was still operating in 1945.[6] It was only after such a showing of present danger that the Court of Appeals concluded (174 F. 2d at pp. 191-192), in the language quoted in part by petitioner (Br. 9), that:

> His relation to the activities of the other witnesses was one of those circumstances. Granted that the statute of limitations had already run on any substantive crime he may have committed in 1936 when the title to this car was of record transferred to him, he is nevertheless not immune from possible prosecution. The evidence which tends to show that Hiss was guilty of criminal conspiracy may also show, or be supplemented to show, that such conspiracy has continued to exist and to be carried out ever since or at least to a date not

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[6] This evidence was not specifically summarized by the Court of Appeals in the opinion but appeared in the record, O.T. 1949, No. 140, pp. 66-67 and an exhibit entitled "Soviet Espionage within United States Government," Second Report, House Committee on Un-American Activities, 80th Cong., 2d Sess., Dec. 31, 1948, p. 9.

> now affected by any statute of limitations. Such evidence may show that the appellant was, and perhaps is, a co-conspirator in that or related conspiracies for which he may be prosecuted.

It is clear, therefore, that even under the Second Circuit's decisions in the *Zwillman* and *Rosen* cases, it is not enough for a witness asserting the privilege against self-incrimination to state merely that his disclosures of facts occurring prior to the period of limitations might be relevant evidence in some hypothetical prosecution. Rather, as was done in those cases, he must show that there is a current, specific, and factual context in which his answers will tend to endanger him. Once it appears that the questions relate to matters as to which prosecution is barred by the statute of limitations, he must affirmatively demonstrate that his answers might incriminate him—to an extent that he would not be required to do if the questions related to facts and events within the period of limitations.

Petitioner's interpretation (R. 16-19; Pet. Br. pp. 3, 11) of the testimony of Mr. Raymond Whearty before a Congressional committee as showing that in 1950 the Department of Justice was planning 12,000 prosecutions under the Smith Act, even if correct, would not constitute such a showing because petitioner in no way indicates, as did Zwillman and Rosen, a plausible contemporaneous connection between himself and

any such prosecutions. Moreover, the petitioner's interpretation of Mr. Whearty's statements is incorrect. Read in context, they mean that the Department of Justice was then proposing to review 12,000 investigation files to determine which cases warranted prosecution,[7] and was

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[7] Hearings before Subcommittee of House Committee on Appropriations, 81 st Cong., 2d Sess., Jan. 12, 1950, p. 86:

"I should also say that with respect to many of these persons engaged in subversive activities, *such as the Communist case in New York*, in line with our appearance before the committee last year, there is a program of extensive suits to prosecute members of the Communist Party who can be shown to be sympathetic and appreciative of its views. We prosecute them *as individuals* under the Smith Act. [Italics supplied.]

"* * * If the Government is sustained in the Supreme Court of the United States, it will be about the fiscal year 1951 when that program will come up. That is the work load which we must look forward to as possible, and indeed very probable.

"Mr. ROONEY. Of the 21,105 cases now pending, how many of them would you say depend upon the outcome of the Communist trial in New York?

"Mr. WHEARTY. Roughly, 12,000.

"Mr. ROONEY. What about the others?

"Mr. WHEARTY. The others are cases in which action may or may not be possible. I would like to elaborate a little bit there. There are a number of cases in the department which are perfectly good trial cases, but can't be proven for the reason that the sole witnesses to the cases are confidential informants and cannot be used as witnesses and those cases have to be canceled out.

* * * * *

"We go to the Federal Bureau of Investigation and in every one of those cases, having read the reports, we determine which of the confidential informants are available for use as witnesses, and almost invariably the answer is that they can't be used—none of them—and cases of that nature go into the hopper with no action taken; but the fact that no action is taken does not mean that the job of reading the reports, appraising them, is eliminated. We communicate with the Bureau many times, even asking the Bureau to reinterview them with an idea to determining whether they are not willing."

requesting funds for additional employees to do the sifting job. They mean nothing more.

The great possibility for abuse of the privilege against self-incrimination is that it may be used, not for the protection of the witness, but for the protection of another person or as a cloak for sheer recalcitrance. As this Court stated in *Brown* v. *Walker,* 161 U.S. at p. 600:

> The danger of extending the principle announced in *Counselman* v. *Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege.

The privilege "is solely for the benefit of the witness" and "a refusal to answer cannot be justified by a desire to protect others from punishment." *Rogers* v. *United States,* 340 U.S. 367, 371. As far back as *In re Willie, supra,* Chief Justice Marshall pointed out that the policy of the privilege against self-incrimination must be balanced against "the principle which entitles the United States to the testimony of every citizen" (25 Fed. Cas. at pp.

39-40). To effectuate the policy of the privilege against self-incrimination, once it appears that a witness is on dangerous ground, he must be given considerable leeway in determining for himself whether his answer to a particular question would tend to incriminate him. In such a case, the protection of the privilege often would be destroyed by explanation of the grounds for asserting it. And in such cases, the policy of the privilege overrides the principle that the law has a right to every man's testimony, and the community takes the chance of whether the privilege is being claimed for the protection of some one other than the witness. On the other hand, the more remote and hypothetical the danger that the witness' answers would tend to incriminate him, the greater the actual danger that his assertion of the privilege is for the protection of some other person or for some other purpose unrelated to self-incrimination.

The degree of danger to the witness, and the inverse danger that the privilege is being abused in derogation of the general duty of all to testify, depends not only upon the text of the questions but upon the context in which they are asked. In the instant case, we do not suggest that the privilege is inapplicable to every question directed at facts occurring prior to the period of limitations or prior to enactment of the relevant criminal statute. We do not contend that today a witness could never be endangered by a question as to

whether he had joined the Communist Party in February 1949. Like other self-incrimination questions, it is a question of degree in each case. Rather, we contend that since, in 1950, petitioner was only asked whether he was a member of the Communist Party and whether Weinbaum attended Party meetings during the years 1937 to 1939, a period prior to enactment of the Smith Act and on which the statute of limitations had expired for at least eight years, his showing that affirmative answers might incriminate him is so weak, and by the same token so suggestive instead of an ulterior purpose, that his claim of the privilege against self-incrimination should not be upheld.

Inherently, the privilege against self-incrimination cannot be effectively regulated by the courts, since in the ordinary case adequate explanations of the occasion for its assertion may not be required. Where the privilege is presumptively unavailable, as by reason of the running of the statute of limitations, a pardon, or trial and conviction or acquittal with respect to the matters as to which the witness is questioned, the possibilities for its abuse [8] to protect other persons will completely escape judicial control unless there is at least required in each case a showing of special circumstances in which the disclosure of facts

[8] The view that the privilege should encompass the protection of persons other than the witness has been repeatedly advanced by members of the Communist Party. *United States* v. *Gates*, 176 F. 2d 78 (C.A. 2); *Rogers* v. *United States*, 340 U.S. 367, 371.

barred from prosecution in the ordinary course of legal proceedings may still involve "real danger" to the witness personally. Actually, the Second Circuit required and relied upon such a showing of special circumstances in upholding the claims of privilege in the *Zwillman* and *Rosen* cases. In each of those cases, the witness established the danger to him in disclosure of pre-statute of limitation facts by pointing out actual or alleged derogatory relationships with other persons prior to or during the period of limitations or both. In the instant case, petitioner has made no such showing, but offers only the speculation that he, as one of thousands of members of the Communist Party in 1937-1938, may be prosecuted at some time in the future under the Smith Act.

If petitioner's contention is upheld, it will be the law that any person who has ever been a member of the Communist Party, no matter how far in the past, may assert the privilege against self-incrimination whenever any court, grand jury, legislative committee or administrative body asks him as to his former relation, or that of any other person, to the Communist Party. The possibilities of abuse of the privilege and the thwarting of proper inquiries, in that his sole purpose in refusing to testify may be to protect another, to avoid opprobrium, or to cloak his personal disapproval of the proceedings, will be unlimited unless there is at least required the demonstration of danger to the witness which was made in the

Zwillman and *Rosen* cases and which is lacking here. As the *Zwillman* case shows, this possibility is not limited to communism, but extends to the entire field of law enforcement.

Accordingly, under the circumstances of this case, including the limited nature of the questions and their relation to facts and events occurring prior to the enactment of the Smith Act and at least eight years prior to the period of limitations, the known quality of affirmative answers, the limited probative value of such answers in a Smith Act prosecution in 1950, the controlled setting in which the questions were asked, and the high degree of danger that under the foregoing circumstances petitioner was asserting the privilege to protect someone else, we contend that his claim of privilege was properly denied.[9]

---

[9] Petitioner also "suggests that the Court below improperly exercised the prerogative of 'weighing' petitioner's good faith" in asserting the privilege (Pet. br. pp. 7-9). He further contends that "It was error for the Court below to conclude that the district judge could make a non-reviewable finding as to the possible peril, or lack of it, confronting the petitioner" (Pet. br. p. 12). It has been made clear from *In re Willie*, *supra*, to *Hoffman* v. *United States*, *supra*, that the witness' "say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified * * *." *Hoffman* v. *United States*, 341 U.S. at 486. And where the statute of limitations has run with respect to the period of time to which the questions relate, even the Second Circuit requires an affirmative showing that despite the ostensible bar to prosecution the witness entertains "reasonable cause to fear danger from a direct answer."

Nothing in the opinion of the court below suggests that it either believed or held that "the district judge could make a nonreviewable finding as to the [danger that affirmative answers would incriminate the petitioner]." Pet. Br. 12. Rather

II

The Sentence of Six Months' Imprisonment Imposed Upon Petitioner for Criminal Contempt of Court Was Not Invalidated by the Provision in the Sentence for the Termination of Such Imprisonment If Petitioner Voluntarily Answered the Questions Prior to the End of the Trial

The Certificate, Judgment and Commitment for Contempt (R. 4-8) provided that the petitioner "is hereby committed to the custody of the Attorney General or his authorized representative for a period of six months * * * unless prior to the expiration of the trial * * * the said Eugene Brunner should purge himself of this contempt by voluntarily offering to answer the aforesaid question" (R. 7). The Weinbaum trial ended a few days later without petitioner volunteering to

---

the court below correctly stated the accepted principle that the trial judge must determine from the circumstances or setting of each case whether a claim of privilege is justified. See *Hoffman* v. *United States*, 341 U.S. 479, 486-487. Ordinarily the trial judge will be more familiar with that setting than an appellate court. The holding of the court below in this respect was that in view of the period of time to which the questions were directed "In sound discretion, the judge could determine whether the claim was made in good faith to prevent self-incrimination of the witness or was used as a cloak in order to attempt to save Sidney Weinbaum from conviction for perjury" (R. 33). For a fuller discussion of the weight to be given to the decision of the trial judge, reference is made to pp. 36-42 of the Government's brief in *Greenberg* v. *United States*, No. 461, this Term.

Petitioner also complains that "The Court's finding that petitioner gave no ground for his refusal to answer is not comportable with the record" (Br. p. 9). To the contrary, the record (R. 13-19) clearly shows, that the petitioner fell far short of the showing of danger of incrimination, surviving the bar of the statute of limitations, which was required and relied upon by the Second Circuit in the *Zwillman* and *Rosen* cases (discussed, *supra*, at pp. 24-27).

answer the questions. Petitioner contends that since the terms of the sentence permitted him to terminate his imprisonment by obeying the court's order to testify, the sole purpose of the sentence was to coerce his testimony. Petitioner concludes that he was thus imprisoned for civil contempt, and that his imprisonment should have terminated at the end of Weinbaum's trial, when he could no longer comply with the court's order to testify. He also contends that "what the trial judge attempted to do was to fix, *in advance,* a punitive punishment for criminal contempt in anticipation of the possibility that the remedial and coercive punishment might not achieve compliance with the Court's direction to answer the questions" (Br. 20-23). We contend that the sentence imposed by the trial judge is a valid sentence for criminal contempt.

When the petitioner refused to testify after the trial judge had denied his claim of privilege, the contempt was complete. Admittedly, imprisonment for a definite term may not be imposed for a civil contempt, which is coercive in nature. The fact that the trial judge sentenced petitioner to imprisonment for a definite term of six months is the strongest proof that he was treating petitioner's refusal as a criminal contempt, i.e., he was imposing punishment, not coercing obedience. The trial concluded a few days later (*supra,* p. 8). To assume that the judge was unaware of the probable

duration of the trial and that he only intended that petitioner serve a few days for the contempt—as would have been the case in a civil contempt—is to do violence to the plain purport of the record and is to assume that the trial judge was unfamiliar with the simplest rules of criminal practice. Since the contempt was committed in the actual presence of the court within the scope of Rule 42(a) of the Federal Rules of Criminal Procedure, there are absent the procedural distinctions between civil and criminal contempt which complicated the situation in *Duell* v. *Duell,* 178 F. 2d 683 (C.A. D.C.), relied upon by petitioner (Br. p. 22).

This Court has often stated that the judicial power to punish for contempt should be exercised sparingly, and we believe that Federal judges generally are reluctant to use their contempt powers. In the instant case, it was clear that the Weinbaum trial would be completed in a few days. Thus, the trial judge, without including in the sentence any provision for its reduction upon the subsequent obedience of the witness during the trial, would have been empowered under Rule 35 of the Federal Rules of Civil Procedure to reduce the sentence to the time already served in the event of such cooperation. Clearly, the judge phrased the sentence as he did solely out of an understandable reluctance to imprison the petitioner for six months without pointing out to him a *locus penitentiae* between the time of the contempt and the

end of the trial. We urge that the self-restraint and compassion of the trial judge cannot be construed as being prejudicial in the slightest degree to the petitioner. For similar sentences containing options to obtain reduction of sentences imposed for criminal contempt, see *Clay* v. *Waters*, 178 Fed. 385 (C.A. 8) (containing a full discussion of the problem), *Abrams* v. *United States*, 64 F. 2d 22, 23 (C.A. 2), and *United States* v. *Rosen, supra*, 174 F. 2d 187 (C.A. 2).[10]

---

[10] The cases cited by petitioner are inapposite. The proceeding below did not at all meet the description enunciated in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 445, and in the majority opinion of *Duell* v. *Duell*, 178 F. 2d 683, 685 (C. A. D. C.): "[T]he contempt proceedings were instituted, entitled, tried, and up to the moment of sentence treated as a part of the original cause." In *Gompers*, the Stove Company was the moving force, seeking compliance with an injunction against boycotting. In *Duell*, it was sought to obtain payment under a separate maintenance contract. In *Parker* v. *United States*, 153 F. 2d 66 (C.A. 1), the purpose was to compel compliance with an order of the Market Administrator of the Department of Agriculture. In the proceeding below, the proceeding was criminal throughout, which would be conclusive upon the reasoning of the cases cited by petitioner, and would assuredly be at least an element persuasive of the criminal nature of the contempt here. Moreover, the contempt here was a contempt directly in the face of the court, in the actual presence of the court—an affirmative act which could not be as clearly undone by later compliance as, for example, a failure to comply with a marketing order.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be affirmed.

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MARCH 1952.

APPENDIX

Filed July 26, 1950. Edmund L. Smith, Clerk. By —— ——, Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

February, 1950, Grand Jury

No. 21408 CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

SIDNEY WEINBAUM, DEFENDANT

INDICTMENT

[U.S.C., Title 18, Sec. 1621—Perjury; U.S.C., Title 18, Sec. 1001—False Statement in Matter within Jurisdiction of Department of the Army of the United States; Concealing Material Fact from Department of the Army of the United States]

The grand jury charges:

COUNT ONE

[U.S.C., Title 18, Sec. 1621]

I

That on or about the 23rd day of September, 1949, a certain proceeding came on to be heard in the City of Los Angeles, within the Central Division of the Southern District of California, before Lt. Colonel Francis M. Wray, as chairman of, and acting on behalf of, the Industrial Employment Re-

view Board, Department of the Army of the United States, said Lt. Colonel Francis M. Wray so acting, then and there having full and competent power and jurisdiction to conduct said proceeding for the purpose of taking evidence offered by defendant SIDNEY WEINBAUM upon his appeal from a denial to him by the Department of the Army to access to classified government information.

II

That thereupon defendant SIDNEY WEINBAUM was called and produced as a witness on his own behalf in said proceeding upon his said appeal to said Industrial Employment Review Board and as such witness was duly sworn by said Lt. Colonel Francis M. Wray, as chairman of said Industrial Employment Review Board, to testify to the truth, the whole truth, and nothing but the truth, the said Lt. Colonel Francis M. Wray, as chairman of the Industrial Employment Review Board being then and there an officer and person empowered under the laws of the United States as competent to administer said oath.

III

The grand jury further charges that said defendant SIDNEY WEINBAUM, being then and there a witness in his own behalf in said proceeding and being so duly sworn and having made oath as aforesaid, did in said proceeding on the 23rd day of September, 1949, knowingly, wilfully, and contrary to said oath testify falsely in a material matter in substance and effect that he, SIDNEY WEINBAUM, had never been a member of the Communist Party, whereas, in truth and in fact, as the defendant then and there well knew, he, SIDNEY WEINBAUM, had

been a member of the Communist Party during and about the year 1938 and within the Southern District of California.

COUNT TWO

[U.S.C., Title 18, Sec. 1621]

I

By this reference thereto, the grand jury repleads paragraphs I and II of count one.

II

The grand jury further charges that said defendant SIDNEY WEINBAUM, being then and there a witness in his own behalf in said proceeding and being so duly sworn and having made oath as aforesaid, did in said proceeding on said 23rd day of September, 1949, knowingly, wilfully, and contrary to said oath, testify falsely in a material matter in answer to questions propounded at said proceeding, as follows:

(By Lt. Colonel Wray)
"Q. 'Have you ever used an alias?'
(By defendant)
"A. 'No.'
(By Lt. Colonel Wray)
"Q. 'And you never used the alias of Sydney Empson.'
(By defendant)
"A. 'I never used.'
(By Lt. Colonel Wray)
"Q. 'That is E-M-P-S-O-N.'
(By defendant)
"A. 'No, I did not.'

(By Mr. Johnson)

"Q. 'Have you at any time used that name? (Referring to the name Empson)

(By defendant)

"A. 'I did not.'

(By Mr. Johnson)

"Q. 'And you are positive, and under oath, that at no time have you ever used any name other than Weinbaum?'

(By defendant)

"A. 'That is right.' "

whereas, in truth and in fact, as the defendant then and there well knew, he had used the name Sydney Empson in connection with activities of the Communist Party, U.S.A., during and about the year 1938 and within the Southern District of California.

COUNT THREE [Was Dismissed]

[U.S.C., Title 18, Sec. 1621]

I

By this reference thereto, the grand jury repleads paragraphs I and II of count one.

II

The grand jury further charges that defendant SIDNEY WEINBAUM, being then and there a witness in his own behalf in said proceeding and being so sworn as aforesaid, did in said proceeding on said 23rd day of September, 1949, knowingly, wilfully and contrary to said oath testify falsely in a material matter, in substance and effect that he had never advocated the establishment of a Communis-

tic form of government in the United States, whereas, in truth and in fact, as the defendant then and there well knew, he had advocated the establishment of a Communistic form of government in the United States during and about the years 1938 and 1939 and within the Southern District of California.

COUNT FOUR

[U.S.C., Title 18, Sec. 1621]

I

By this reference thereto, the grand jury repleads paragraphs I and II of count one.

II

The grand jury further charges that defendant SIDNEY WEINBAUM, being then and there a witness in his own behalf in said proceeding and being so sworn as aforesaid, did in said proceeding on said 23rd day of September, 1949, knowingly, wilfully, and contrary to said oath testify falsely in a material matter, in substance and effect that he had been always opposed to the Communist Party, whereas, in truth and in fact, as the defendant then and there well knew, he had not been always opposed to the Communist Party but, on the contrary, had been active in its behalf during and about the years 1937 and 1938 within the Southern District of California.

COUNT FIVE [Was Dismissed]

[U.S.C., Title 18, Section 1001]

On or about April 8, 1949, in Los Angeles County, California within the Central Division of the Southern District of California, the defendant SID-

NEY WEINBAUM did, in a matter within the jurisdiction of the Department of the Army of the United States, knowingly and wilfully make a false, fictitious, and fraudulent statement and representation, namely: on a certain Personnel Security Questionnaire the defendant, in answer to Question Number 26, which question asked for "Organizational Membership (List all organizations in which you hold or have held membership). Name and Address—Type—Office Held—From—To," answered by stating, "American Physical Society, Professional, 1944 to Now and Sigma Xi, Research 1932 to Now," which said statement and representation was false, fictitious, and fraudulent, as the defendant well knew in that said answer and statements so made by the defendant failed to reveal and state that the defendant had also held membership in the Communist Party, U.S.A., during and about the year 1938 and within the Southern District of California.

COUNT SIX

[U.S.C., Title 18, Sec. 1001]

On or about April 8, 1949, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant SIDNEY WEINBAUM did, in a matter within the jurisdiction of the Department of the Army of the United States, knowingly and wilfully falsify, conceal, and cover up by trick, scheme, and device a material fact, namely: on a certain Personnel Security Questionnaire the defendant, in answer to Question Number 26, which question asked for "Organizational Membership (List all organiza-

tions in which you hold or have held membership). Name and Address—Type—Office Held—From—To," answered by stating, "American Physical Society, Professional, 1944 to Now and Sigma Xi, Research, 1932 to Now," which said answer and statement was a trick, scheme, and device to knowingly conceal and cover up the material fact that the defendant had theretofore, in addition to the organization therein set forth, as above alleged, knowingly held membership in the Communist Party, U.S.A., during and about the year 1938 and within the Southern District of California.

A TRUE BILL.

Foreman.

(S.) ERNEST A. TOLIN,
United States Attorney.

EAT:aw

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IN THE

Supreme Court of the United States

October Term, 1951

No. 442

EUGENE M. BRUNNER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONER'S REPLY BRIEF.

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EUGENE M. BRUNNER, *Petitioner,*

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UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S REPLY BRIEF.

ARGUMENT.

We respectfully submit that the Government has failed to demonstrate any basis for rejecting petitioner's claim of privilege.

In the same breath it admits the possibility of prosecution, but adopts the conclusions of the Circuit Judge and asserts that prosecution is unlikely.

The Government urges repeatedly that the answers sought from Brunner would have little *probative weight* when the question at issue is *admissibility*. As we will show, and as the Government must confess, this argument is in direct contradiction to the position it has asserted, and is asserting successfully, in past and current Smith Act

prosecutions. That the *Dennis*[1] defendants are in prison today would seem to be answer enough.

The Government dwells at length on principles of law which are not now the law. Certainly it is not the law that petitioner must show his answers would disclose "facts which constitute a crime," a "basis for conviction," a "punishable offense," a "necessary and essential part of any crime" or involvement in "leadership and conspiratorial activities." As we will demonstrate, the Government is urging today, but elsewhere, that mere Communist Party membership is evidence of crime. Indeed, the position of the Government in current Smith Act prosecutions would justify, absent any showing, the assertion that the two answers sought would rise far above the dignity of mere "links in a chain." The U. S. Attorney's office would eagerly allege membership and attendance at meetings as overt acts in support of conspiracy indictments.

The argument that petitioner was not the object of "hot pursuit" ignores the record as well as the facts of present day life. The Government argues, in effect, that because the Department of Justice announced its intention of prosecuting 12,000 Americans as individuals, Brunner had no right to anticipate that he would be one of those selected. We respectfully submit that conjecture of this sort is even less of a substitute for the Fifth Amendment than the assurances extended to petitioner by the District Judge, or the promises of the U. S. Attorney's office in the *Kasinowitz*,[3] *Alexander*[3] and *Healey*[4] cases. That Brunner might be one of those whose projected prosecution would be screened out is no argument for the surrender of his constitutional rights.

Nor is there any validity to the argument that the setting in which Brunner was interrogated was "controlled"; that

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[1] *Dennis* v. *U. S.*, 341 U. S. 494.
[3] *Kasinowitz* v. *U. S.*, 181 F. (2) 632.
[3] *Alexander* v. *U. S.*, 181 F. (2) 480.
[4] *Healey* v. *U. S.*, 186 F. (2) 164.

the issues raised by the Weinbaum indictment should have persuaded Brunner that after he had admitted membership and Party activity prior to 1940, the Government would have forthwith excused him from the witness stand. This rationale is likewise no substitute for the Fifth Amendment.

It is also suggested that this Court should disregard the *Zwillman*[5] and *Rosen*[6] cases as peculiar to the Second Circuit, as *probably erroneous*. We can only answer that this Court has regarded these opinions, written respectively by Justices A. Hand and Chase, with approval. Nor is it proper, in the light of the *Blau*,[7] *Hoffman*,[8] *Zwillman* and *Rosen* opinions to suggest that petitioner's case must be distinguished because the answers sought related to a period too remote to justify any fear. Indeed, on the face of it, and in the light of matters hereinbelow set forth, petitioner had a great deal more to fear than Hoffman, Zwillman or Rosen. The relentless pursuit of Communists on the current political scene is a well advertised fact. Every literate American must be aware of it. Contending, as it is before other tribunals, for the admissibility of the very type of evidence which it blows down in this case, the argument of the Government bespeaks a casual regard for the dignity to which a long line of cases has elevated the Fifth Amendment.

Recent pronouncements of this Court lend further weight to Petitioner's claim that the questions asked placed him in real peril. In *Carlson* v. *Landon*, 343 U. S. ——, No. 35, October Term 1951 (Decided March 10, 1952—Opinion by Justice Reed) the Court observed (pp. 10-11):

> We have no doubt that the doctrines and practices of communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien communists

[5] *Zwillman* v. *U. S.*, 108 F. (2) 802.

[6] *Rosen* v. *U. S.*, 174 F. (2) 187.

[7] (*Patricia*) *Blau* v. *U. S.*, 340 U. S. 332.

[8] *Hoffman* v. *U. S.*, 341 U. S. 479.

> under its power to regulate the exclusion, admission and expulsion of aliens. (See also footnote 21 at bottom of page 10, slip opinion).

And in *Harisiades* v. *Shaughnessy*, No. 43, October Term 1951, (opinion by Justice Jackson):

> "Under the conditions which produced this Act can we declare that Congressional alarm about a coalition of Communist power without, and Communist conspiracy within the United States, is either a fantasy or a pretense?

As objective proof that the Government's argument is in diametric opposition to its official position we direct the attention of the Court to the following matters:

A. The Governmen's brief in the Bail cases.

In *Stack et al.* v. *Boyle*, 342 U. S. 1 (October Term 1951 No. 400), the Government, in arguing that bail of $50,000 was not excessive in Smith Act indictments, urged as a contributing factor that all of the defendants had for a considerable period of time been engaged in Communist Party activities. The following statements are from the brief, pages 19, 20. (Italics ours)

> Petitioner Kusnitz, who was born in Russia, *has been engaged in Communist Party activities since 1929.*
>
> Petitioner Yates, *who has been a member of the Communist Party since 1933,* is now State Secretary of the Communist Party of California.
>
> Petitioner Steinberg, *who has been a member of the Communist Party since 1937,* is Legislative Director of the Los Angeles County Communist Party.
>
> Petitioner Lima, *who has been engaged in Communist Party activities since 1937,* is East Bay Regional Chairman of the Communist Party at San Francisco.

It is a reasonable assumption that this data was not idly included; that the alleged Communist activities of these de-

fendants dating back respectively to 1929, to 1933, to 1937, made them bad risks; that their Communist Party activities argued a conspiracy which came into being long before 1940; that this protracted activity made them *worse* risks, and therefore entitled only to the minimum benefits of the presumption of innocence.

B. The Government's brief in the Dennis case 183 F. (2) 201 (CCA 2).

In its brief filed in the Second Circuit, the Government placed strong reliance, with the approval of the Court, upon evidence of membership and activity ante-dating enactment of the Smith Act. Portions of that brief are herein included as petitioner's Appendix "A."

C. Official publicity releases by the Attorney General and the Director of the Federal Bureau of Investigation.

In connection with the arrests of defendant presently on trial in Los Angeles, and those shortly to be on trial in New York, coincidentally with the arrests the United States Department of Justice, on its official letterhead, under the authorized signature of Attorney General J. Howard McGrath and the Director of the Federal Bureau of Investigation J. Edgar Hoover, announced the filing of complaints in Los Angeles and New York. In each instance the announcements were accompanied by biographical data on each of the defendants with pointed reference to their Communist Party membership and activities dating back as far as 1922.

Excerpts from three such releases are herein included as Appendices B, C and D.[9]

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[9] True copies of these releases, together with true copies of the Los Angeles documents excerpted in Appendices E, F and G are being deposited with the clerk of the Supreme Court contemporaneously with the filing of this brief.

D. Testimony on the current Los Angeles trial.[10]

Excerpts from this proceeding are herein included as Appendix E.

E. Brief of the Government in the Los Angeles case (*U. S.* v. *Schneiderman et al., supra*).

Excerpts from this document are included herein as Appendix F. That the Government would in a prosecution regard the answers sought from petitioner as admissible, is here made abundantly clear.

F. Oral argument of the Government in the Los Angeles case (*U. S. Schneiderman, et al., supra*).

Incorporated herein as Appendix G are excerpts from the argument of Government counsel (pages 3467 to 3500), Official Transcript, Vol. 25—March 19, 1952.

The Fifth Amendment was designed to prevent the witness from ever being accused or tried on evidence obtained from his own mouth by compulsion.

It does not exist in a vacuum, and this Court repeatedly has resisted any attempts to water down its meaning. It is a "fighting clause" and is valid only "when insisted upon by a belligerant claimant in person." It "is neither accorded to the passive resistant nor to the person ignorant of, or indifferent to, his rights."[11]

> Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. (*Watts* v. *Indiana*, 338 U. S. 49)
>
> Men now in concentration camps could speak to the value of such a privilege, if it were or had been theirs. There is in it the wisdom of centuries, if not that of

[10] *U. S.* v. *Schneiderman et al.*, No. 22131-Criminal, U. S. District Court, Southern District of California, Central Division.

[11] *U. S.* v. *Johnson*, 76 F. Supp. 538 (1947).

> decades. . . . [The Court] cannot be partner or partisan with the prosecutor, subtly or otherwise, and retain the confidence of the accused and the public or its own self-respect. . . . In our system the accused is not such [a criminal] until the jury pronounces 'guilty.' Until then the Court, whether magistrate or trier of ultimate fact, should not extract the word from him or permit its use against him for conviction when it or another court has done so. The privilege still stands guard when so much is attempted by inquisition, however subtle, at any stage of the proceedings, preliminary or otherwise. Rutledge, J., from the court, in *Wood* v. *United States* (App. D. C. 1942), 128 F. 2d 265, 278-9).

It will not do to urge, nor do we believe this Court will be persuaded, that the privilege against self-incrimination, a constitutional barrier for many generations against unlawful inquisition, can only be exercised by its surrender. The privilege operates neither automatically nor by indirection. The witness, as did the petitioner here, must *assert* it, and this Court, recognizing that it originates from early struggles against enforced conformity and the search for heretics and dissenters, must vigorously *reassert* it.

A logical extension of the Government position in this case would place every American at the mercy of the first prosecutor who cails him to the witness stand and asks him abont his past Communist connections, real or imaginary. The witness would have two choices and only two: either summary jailing for contempt, or the formidable prospect of prosecution for transgressing the provisions of the Smith Act or the conspiracy statutes. It is not too much to suggest that under these circumstances the Fifth Amendment will have been more than watered down—it will have been erased.

CONCLUSION.

The conviction of petitioner should be reversed.

Respectfully submitted,

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APPENDIX "A"

From Brief of the Government in *Dennis* v. *U. S., supra,* page 371 (CCA-2):

> "Inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party. Individuals who assume such obligations are chargeable, on ordinary conspiracy principles, with responsibility for and participation in all that makes up the Party's program. The conspiracy principle has traditionally been employed to protect society against all 'ganging up' or concerted action in violation of its laws. No term passes that this Court does not sustain convictions based on that doctrine for violations of the antitrust laws or other statutes. However, there has recently entered the dialectic of politics a cliche used to condemn application of the conspiracy principle to Communists. 'Guilt by association' is an epithet frequently used and little explained, except that it is generally accompanied by another slogan, 'guilt is personal.' *Of course it is; but personal guilt may be incurred by joining a conspiracy. That act of association makes one responsible for the acts of others committed in pursuance of the association.* It is wholly a question of the sufficiency of evidence of association to imply conspiracy. There is certainly sufficient evidence that all members owe allegiance to every detail of the Communist Party program and have assumed a duty actively to help execute it, so that Congress would, on familiar conspiracy principles, charge each member with responsibility for the goals and means of the Party. [Emphasis supplied.]
>
> *CIO* v. *Douds,* 70 Sup. Ct. 674.

"The quoted language is simply an application of the accepted principle that conspiracy is a partnership in criminal purposes, and that declarations of a conspirator in furtherance of the conspiracy are admissible against [372] all of the conspirators."

• • • • • • • • • •

[372] "It is unnecessary to show that the conspirator knew the full scope of the conspiracy or participated in carrying out each detail."

• • • • • • • • • • •

[373] "On the basis of the foregoing, it is clear, we submit, that there was no error in the admission of evidence relating to statements by subordinate officials of the Party and those working with them in execution of appellants' decisions."

• • • • • • • • • • •

[375] "The authorities support the admissibility of proof far beyond that of which appellants complain here (Br. 326-332). In *Standard Oil Co.* v. *United States*, 221 U. S. 1, the Supreme Court held (221 U. S. at 46-47) that it was proper to give consideration to the defendants' acts prior to the passage of the Sherman Act in so far as such evidence 'tended to throw light upon the acts done after the passage of the Anti-Trust Act.' Thus, acts occurring as far back as 1870 were properly considered, even though the statute involved was passed in 1890. See also *United States* v. *Reading Co.*, 253 U. S. 26 (events dating from 1871 relating to anthracite coal tonnage admitted); *United States* v. *E. I. duPont de Nemours & Co.*, 188 Fed. 127 (C. C. D. Del.) (considered facts of explosive industry from 1872); *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa.) (facts from 1858 relating to Pullman business considered).

"Similarly, in *Eagan* v. *United States*, 137 F. 2d 369 (C. A. 8), involving a conspiracy to violate the Public Utility Holding Company Act, it was held that acts prior [376] to the time when the act became applicable to the defendant corporation were admissible. The court stated (pp. 381-382):

> "The indictment charged a conspiracy not barred by the statute of limitations. The evidence tended to show that the conspiracy was on foot long before February 25, 1937, the date on which the Act became applicable to the defendant corporation, and it continued after that date. * * * It was permissible, however, to prove

> the acts of the earlier dates. They tended to show the existence of the conspiracy and the intent of the conspirators. * * *

"The admissibility of evidence prior to the indictment period but during the statutory period naturally follows. In *Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, pre-1929 evidence (including that prior to 1919) was held admissible with reference to a 1929 combination many of whose members were non-existent in 1919. This evidence tended to show the "existence of a continuing combination among respondents to utilize the basing point pricing system." (333 U. S. at 704.) On this point the Court stated (333 U. S. at 704-705):

> "The Commission did not make its findings of post-1929 combination, in whole or in part, on the premise that any of the respondents' pre-1929 or NRA code activities were illegal. The consideration given these activities by the Commission was well within the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.

[377] "In *Heike* v. *United States*, 227 U. S. 131, the Supreme Court in referring to proof of acts prior to the indictment stated (227 U. S. at 145):

> "The longer it had lasted the greater the probability that he knew of it and that his acts that helped it were done with knowledge of their effect.

"In addition, it is the well established rule that in a situation in which conspiracy is alleged, the acts of the group (or in this case the Party) are admissible, as well as the acts of the individual conspirators. In *United States* v. *Pelley*, 132 F. 2d 170 (C. A. 7), certiorari denied, 318 U. S. 764, evidence relating to the National Silver Shirt organization was admitted, as were the acts of the individuals.

This, too, was before the passage of the act on which the indictment was based. Similarly, in *Haywood* v. *United States*, 268 Fed. 795 (C. A. 7), certiorari denied, 256 U. S. 689, involving a conviction for conspiracy to violate sundry laws of the United States, such as the Selective Service Act (World War I), the Espionage Act, etc., the court stated (page 807):

> "Evidence of the organization of the I. W. W., the defendants' control, and the methods of operation through correspondence, pamphlets and official newspapers, was competent, though ante-dating the laws in question, as bearing on defendants' possession and knowledge of the use of the means by which these felonies could be committed.

"This same approach was taken and the same type of group evidence admitted in *Dunne* v. *United States*, 138 F. 2d 137 (C. A. 8), certiorari denied, 320 U. S. 790.

[378] "Thus, in the instant case, the pre-statute and pre-indictment activities of the individual conspirators outlined the purposes and activities to which appellants returned when the Party was reconstituted in 1945. They disclosed a long continuing and persistent attitude consistent with the state of mind charged in the indictment. See *Debs* v. *United States*, 249 U. S. 211, 215; *Williamson* v. *United States*, 207 U. S. 425, 451; *Allis* v. *United States*, 155 U. S. 117; *Wood* v. *United States*, 16 Pet. 342, 360-361."

APPENDIX "B"

Excerpts from the official release of June 20, 1951. (Described as "background material".) (Italics ours.)

> "Israel Amter * * * is a member of the New York State Committee of the Communist Party. In *1919* he became a charter member of the Communist Party and has been acknowledged as one of the leaders since that date. From *1920* to *1923* he was an organizer of the Friends of Soviet Russia in the United States, and in *1922* he was elected to the Central Executive Com-

mittee of the Workers (Communist) Party. He was a member of the National Committee of the Communist Party, USA, from *1922* through *1940*."

"Isidore Begun * * * has been active in the Communist Party since about *1924*."

"He [Alexander Bittleman] arrived in the United States in *1912*. In *1920* he was a delegate to the Underground Convention of the United Communist Party near Kingston, New York, and since that time has been an active member and official of the Communist Party."

"Charney was a Communist Party organizer from *1935* to *1941*."

"Flynn entered the Communist Party in the latter part of *1936* with the first public and formal announcement of this being in February, *1937*."

"She is the National Educational Director of the Communist Party, USA, having been in the Party since *1925*. From *1925* to *1929* she was a member and an organizer as well as the Educational Director of the Young Communist League."

"Gerson joined the Communist Party in *1931*, when he was a textile organizer in the South and has been the Legislative Representative of the New York State Communist Party from 1943 up to the present, except for service in the Army from January 19, 1944, to January 29, 1946. He was a member of the 'Daily Worker' staff from December, *1933*, to January, *1938*, resigning to take a position with the staff of Councilman Stanley M. Isaacs of New York City."

"Jerome joined the Communist Party in the late *1920's* and since that time has been active in the Agitation and propaganda Department."

"Jones has been in the Communist Party since about *1938* and was formerly the Chairman of the New York County Young Communist League and a member of the National Council of the Young Communist League."

"Lannon has been in the Communist Party for nineteen years."

"Perry was admitted to the Communist Party in *1932* and from *1934* to *1936* he was the Executive Secretary of the California-Arizona District of the International Labor Defense."

"Trachtenberg has been extremely active and prominent in the field of Communist publications for more than *25 years.*"

"Weinstock joined the Communist Party not long after his arrival in the United States in *1924* and was the Manager of a Hungarian Communist daily newspaper in *1929* and *1930*. In *1934* he was assigned by the National Committee of the Communist Party to be responsible for work in the trade union field."

APPENDIX "C"

Release of July 26, 1951 ("Background Material") (Italics ours)

"Rose Chernin, who is also known as Rose Kusnitz, has been identified with Communist Party activities since *1929.*"

"Ernest Fox has been identified with Communist Party activities since *1934.*"

"Dorothy Healey became a member of the Young Communist League in *1928*, at the age of 14."

"Steinberg became a member of the Communist Party in early *1937.*"

"Mrs. Yates was a member of the Socialist Party from 1932 to September *1933*, when she joined the Communist Party."

APPENDIX "D"

Release of August 31, 1951 ("Background Material") (Italics ours)

"Carlson joined the Young Communist League in 1931, held a number of positions including that of Editor of "Young Worker," a weekly newspaper, and was head of the League in California in *1937*. He be-

came a member of the Communist Party in *1931* or *1932* and has been Financial Director of the Party in California, State Secretary in Wisconsin and since 1949 has held several Party positions in Los Angeles including that of Educational Director for Los Angeles County."

"Ben Dobbs * * * has been associated with Communist Party activities since *1933*."

"Spector has been connected with Communist activities since *the origin* of the Party in the United States, and spent the period from June, 1930, to July, 1931, in San Quentin Prison after conviction on criminal syndicalism charges in connection with Communist activities."

APPENDIX "E"

(From Volume IV, Official Transcript, February 7, 1952, *Schneiderman* v. *U. S.*, *supra.*)

p. 455

Q. When did you first meet the defendant Oleta O'Connor Yates?
A. I think I met her almost when they first came down from Seattle.
Q. When would that be?
A. Around the latter part of 1935.
Q. Was she a member of the Communist Party?
A. Yes.

* * * * * * * * * *

p. 463

Q. Now then, did you ever attend any schools?
A. Yes.
Q. Conducted by the Communist Party?
A. Yes.
Q. When was the first such school?
A. I think it was the latter part of '37, November.

* * * * * * * * * *

p. 547

Q. Where did you first meet the defendant Ben Dobbs?

A. San Francisco, 1935.
Q. What was he doing then?
A. He was the director of Young Communist League.

. . . . . .

p. 548

Q. Where did you first meet Frank Carlson?
A. In 1935 in San Francisco.
Q. And what was he?
A. He was state director of the Young Communist League.

. . . . . .

p. 552

Q. Where did you first meet Frank Spector?
A. He came out from New York to become the county organizer in San Francisco sometime around—I think around about the first part of 1936. I am not sure of the date.
Q. When did you last see him in the Communist Party?
A. About 1939 or '40; about 1940.

APPENDIX "F"

EXTRACTS FROM GOVERNMENT'S SUPPLEMENTAL MEMORANDUM PERTAINING TO DECLARATIONS MADE PRIOR TO EFFECTIVE DATE OF SMITH ACT. *United States* v. *Wm. Schneiderman, et al., No. 22151-Crim.*

(Filed by Government in reply to defendants' motions to strike testimony concerning CP membership and declarations prior to effective date of Smith Act.)

"Without repeating our previous contentions, we believe that the acts and declarations testified to by the witness Saunders, occurring prior to the effective date of the Smith Act (June 28, 1940), are competent not only on the question of intent, purpose, motive and design, but also as they indirectly tend to shed light upon the association, or con-

certed action of any or all of the defendants that Saunders so testified to (18 U.S.C. 2).

"We believe that a conspiracy *in fact* existed prior to June of 1940.

"We call attention that while the instant indictment was not brought under an earlier statute which denounced conspiring to overthrow the Government by force, still we believe that it can be properly argued that even prior to the effective date of the Smith Act there was in effect a statute which these defendants could have been charged with having conspired to violate, and which statute they were *in fact* and legally conspiring to violate even prior to the effective date of the Smith Act. This section is closely related to the Smith Act. We believe that such a conspiracy would not be separate and apart from the conspiracy to violate the Smith Act; in fact, we believe the same acts, declarations and conduct could be offered in a conspiracy charge to violate either or both of such statutes.

"Said section, which was enacted in 1909, is 18 U.S.C., Section 6. As pertinent, it reads as follows:

> '§ 6. (Criminal Code, Section 6) *Seditious conspiracy.* If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, * * *.' (Repealed June 28, 1940)

"It is true that the present indictment does not charge a violation of this earlier section; however, it well may be argued that the acts and conduct, namely, the unlawful agreement or concerted action of the defendants, were *in fact* a conspiracy in violation of this Act prior to the effective date of the Smith Act."

* * * * *

"It appears to be a well established principle, both in conspiracy cases and others, that evidence of previous actions even though they have a tendency of showing a com-

mission of other crimes are relevant to establish the following factors, namely: Guilty intent, purpose, design or knowledge. This rule is announced in the often referred to case of *Williamson* v. *U. S.*, 207 U. S. 425, where, on page 451 after the court refers to the evidence of previous acts objected to, the court approved their admission and states that such testimony was ' * * * , also competent as tending to establish on the part of the conspirator guilty intent, purpose, design or knowledge.' "

* * * * *

"It is our position, in the instant case, that all facts which tend to shed light; that is, to show association, acts and participation of a similar nature, aiding or abetting, may be received upon the question as to whether or not the declarants and other Party workers were and are co-conspirators of the defendants. This, we believe, is in line with the *Dennis* Opinion, 183 F. 2d 201, at page 231."

* * * * *

APPENDIX "G"

ORAL ARGUMENT LOS ANGELES, MARCH 19, 1952

(Volume 25 Official Transcript—*U. S.* v. *Schneiderman, et al.*, supra)

p. 3467

Mr. Neukom: .... Now, to go further, we believe that the evidence in this case can well show during the course of it and when it is all produced that every person who is a member of the Communist Party, who fully understands its aims and objects, would properly be called a co-conspirator; but, from the matter of practicability and in due consideration of the Katiokis case, where the courts have told us not to have mass prosecutions if we could avoid them, it would be unfeasible and improper to indict every person.

* * * * * * * * * *

p. 3468

Now, I can't entirely agree, although we predicated this indictment under the Smith Act, I still do believe that the previous act which was superseded or which was cancelled by reason of this Smith Act could have been one under which these people could have been conspiring and under which properly they were conspiring to violate even prior to the passage of the Smith Act. That Act I have set up very briefly in our brief here.

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p. 3471

The Court: Is it the Government's theory that this evidence is admissible upon the ground that the same conspiracy existed in 1937 which is charged in the indictment?

Mr. Neukom: Yes, it did. That is our theory because—

The Court: If the theory falls, is the evidence admissible under any other theory?

Mr. Neukom: I think it is admissible under the theory of showing the entire background of the enterprise, even though the conspiracy was not illegal.

The Court: What enterprise, the Communist Party?

Mr. Neukom: Not the Communist Party as such, but the principles that the leaders of the Communist Party advocated through the medium of the Communist Party. The Communist Party—

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p. 3472

The Court: Aren't you saying the same thing?

Mr. Neukom: Well, it amounts in a sense to the same thing.

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p. 3475

The Court: Is the nature and character of the Com-

p. 3476

munist Party prior to the Smith Act an issue in this case?

Mr. Neukom: I think it is in issue in this case only to this effect: I think it is in issue in this case to show a continuation of the advocacy prior to the passage of the Smith Act, to show that it continued afterwards, because I think this we will agree is elementary: People can be joining right along the line and be responsible for what his co-conspirator did 20 years ago, if they joined the same conspiracy, regardless whether they knew what had really happened.

The Court: But if the same conspiracy did not exist prior to the Smith Act, is there any theory upon which this evidence is admissible?

Mr. Neukom: But, your Honor, our theory is this: That they were teaching and advocating the overthrow of the Government of the United States prior to 1940, and the mere fact that it had not been declared unlawful does not mean that you cannot analyze what was their intent and state of mind prior to that time when the act did become unlawful.

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p. 3478

The Court: Then as I understand it, the Government's theory of admissibility of the pre-Smith Act evidence is that the same conspiracy existed prior to the Smith Act

p. 3479

as is charged in the indictment.

Mr. Neukom: That is right, although it was not in violation. The second, of course, was not in effect at that time.

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p. 3480

The Court: When the Government offers evidence that the Communist Party in 1937 was conducting a certain school, is that on the theory that the indictment in effect charges, and the Government contends, not only that the conspiracy alleged in the indictment existed prior to the enactment of the Smith Act but also that the Communist Party throughout has been the medium through which the conspiracy operated?

Mr. Neukom: That is right; from its inception. We contend, so far as the Communist Party ever had any strength in this country, or in its inception, we contend that it has advocated these principles that have not had any great change, as your Honor will know, with the exception of certain books and magazines that we have read which are elaborations upon these principles, some of it—and I am using the language

p. 3481

of Justice Murphy—the most bombastic advocations are contained in this old literature which they give current to. And we contend that these people, the leaders, as distinguished from the rank and file who might well be termed also lesser co-conspirators, but these leaders who have been with it for years and years, and we believe we will show thoroughly understood what their strategy was, as distinguished from their tactics. Your Honor will recall the differentiations the witness made between the strategy, the ultimate goal, and the tactics of popularity, being for this, that or the other movement which was a lure or which might interest people in joining the party.

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p. 3482

The crime here is the conspiracy to advocate the overthrow by force and violence, of course, regardless of

whether it is successful or not. We can show that conspiracy, and if we can show anything which tends to show these continued acts even back prior to 1940, I think we are entitled to have it remain in the record.

The Court: Is that upon the theory, apart from the conspiracy theory, that what the Communist Party did, what the Communist Party stood for, is an issue in the case because the defendants are charged to have operated through

p. 3483

the Communist Party?

Mr. Neukom: I think that is correct. That is correct if we can show there is a definite tie between these defendants and the others who were functioning at any period that we have adduced testimony on.

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p. 3490

In passing and dropping the point, your Honor, that is an ultimate matter that, of course, the jury will have to determine, and whether they can infer that these declarants were committing an act in furtherance of this conspiracy even prior to 1940, we believe goes to the weight rather than to the admissibility of any of this evidence.

• • • • • • • • • • •

p. 3499

The Court: As I understand what Mr. Neukom said, it was the government contends the Communist Party teaches and advocates not only during the period of the indictment, but during the period prior to the indictment teaches and

p. 3500

advocates the duty and necessity of overthrowing the government of the United States by force and violence.

Mr. Neukom: That is correct.[12]

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[12] At page 1410 of the official transcript in the same proceeding (Volume II, February 18, 1952), appears the following statement by the prosecutor:

> "Mr. Neukom: That is our position. In fact, our position is just a common program here. We contended it started back—well, as we said, we were going to hope *to offer evidence back to 1934*, and we certainly would not have had that in mind if we did not feel that there was an identity."
> (Italics ours.)

APRIL 7, 1952.

Per Curiam Decisions.

No. 442. BRUNNER *v.* UNITED STATES. Certiorari, 342 U. S. 917, to the United States Court of Appeals for the Ninth Circuit. Argued April 2, 1952. Decided April 7, 1952. *Per Curiam:* Judgment reversed. *Blau* v. *United States*, 340 U. S. 159. MR. JUSTICE REED and MR. JUSTICE DOUGLAS dissent. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case. *William B. Esterman* and *A. L. Wirin* argued the cause and filed a brief for petitioner. *J. F. Bishop* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Robert W. Ginnane* and *Robert S. Erdahl.* Reported below: 190 F. 2d 167.